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No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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RONALD MANNING, Commissioner of the
Department of Human Resources of
the State of Connecticut,

*Petitioner*

*v.*

ELINOR NELSON, DOUGLAS SPELLS,
DENNIS EATON, PHILLIP CORSO,
Individually and on behalf of
those similarly situated.

*Respondents*

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Internal Revenue Service tax intercept progam, which provides for the interception of income tax refunds of those persons owing unpaid child support assigned to a state, includes earned income credits authorized under the United States Internal Revenue Code.

2. Whether the decision of the United States Court of Appeals for the Second Circuit, upholding the ruling of the United States District Court of Connecticut that persons who claimed earned income credits as part of their refunds of tax overpayments and whose tax refunds were intercepted for past-due child support assigned to the State of Connecticut, were entitled to reimbursement of that portion of their tax refund attributable to earned income credits, violates the Eleventh Amendment to the United States Constitution, as such decision will result in the recovery of damages from the State of Connecticut.

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*The Second Circuit also decided the companion appeal, Docket No. 83-6240, in the same decision, *Nelson, et al. v. Donald Regan, Secretary of the United States Department of Treasury, and Margaret M. Heckler, Secretary of the United States Department of Health and Human Services.* The federal defendants have not petitioned for a writ of certiorari.

## TABLE OF CONTENTS


*Page*

Opinions Below ..... 1

Jurisdiction ..... 2

Statutes Involved ..... 2

Statement of Case ..... 2

Reasons For Granting Writ ..... 10

I. The term "overpayment" includes earned income credits for the purpose of the tax intercept program wherein income tax refunds are offset against past-due child support and that therefore such earned income credits are subject to offset contrary to the ruling of the Second Circuit Court of Appeals..... 10

II. The decision of the United States Court of Appeals for the Second Circuit that persons who claimed earned income credits as part of their tax overpayment and whose tax refunds were intercepted for past-due child support assigned to the State of Connecticut were entitled to reimbursement of that portion of their tax refund attributable to earned income credits, violates the Eleventh Amendment to the United States Constitution as such decision will result in the recovery of damages from the state ..... 14

Conclusion ..... 17

Appendix A: *Nelson v. Regan,* Defendant Mannings petition for rehearing denied, Filed May 31, 1984 ..... 1a

*Page*

Appendix B: *Nelson v. Regan*, Decision of the United States Court of Appeals, Second Circuit, decided March 31, 1984, reported at 731 F.2d 105 (2nd Cir. 1984) ..... 3a

Appendix C: *Nelson v. Regan*, Ruling on Remedy and Final order, United States District Court, District of Connecticut decided April 22, 1983, unreported ..... 17a

Appendix D: *Nelson v. Regan*, Ruling on Federal Defendant's motion to dismiss, plaintiff's motion for class certification and cross motions for summary judgment, United States District Court, District of Connecticut, decided January 14, 1983, reported at 560 F.Supp. 1101 (D. Conn. 1983) ..... 32a

Appendix E: *Sorenson v. Secretary of Treasury of the United States*, 557 F. Supp. 1051 (N.D. Wash. 1982) ..... 50a

Appendix F: Affidavit of Anthony DiNallo, filed in U.S. District Court Conn. in *Nelson v. Regan*, dated September 13, 1983 ..... 68a

## TABLE OF AUTHORITIES

*Page*

**Cases:**

Consumer Product Safety Commission v. GTE Sylvania Inc., 447 U.S. 102 (1980) ..... 11

Coughlin v. Regan, 10 Fam. L.R. 1371 (U.S.D.C. Maine 4/11/84) ..... 13

Edelman v. Jordan, 415 U.S. 651 (1974)..... 14, 15

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) ..... 15

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)..... 14, 15

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)..... 11

Hans v. Louisiana, 134 U.S. 1 (1890) ..... 14

Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977)..... 15

Milliken v. Bradley, 433 U.S. 267 (1977) ..... 9, 16

Nelson v. Regan, 731 F.2d 105 (2d Cir. 1984).. 1, 8, 10, 11

Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983) 1, 6, 10, 11

Quern v. Jordan, 440 U.S. 332 (1979)..... 9, 15, 16

Rucker v. Secretary of the Treasury of the United States, 555 F. Supp. 1051 (D. Colo. 1983) ..... 12, 14

*Page*

Sorenson v. Secretary of Treasury of the United States, 557 F. Supp. 729 (N.D. Wsh. 1982) ..... 9, 12, 14

State of Alabama v. Pugh, 438 U.S. 781 (1978)..... 14

Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)..... 14, 15

**Constitutional Provisions:**

United States Constitution, Amendment V ..... 2

United States Constitution, Amendment XI ... 4, 9, 14, 16

United States Constitution, Amendment XIV ..... 4, 15

**Statutes:**

Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35 §2331 95 Stat. 357 (1981) ..... 3, 10, 13

26 U.S.C. §43 ..... 2, 3, 10, 13

26 U.S.C. §6401 ..... 2, 8, 10, 11, 12

26 U.S.C. §6402 ..... 2, 8, 10, 11

26 U.S.C. §7421(a) ..... 6, 7

26 U.S.C. §7422(a) ..... 5

28 U.S.C. §1254 (1)..... 2

28 U.S.C. §1331 ..... 3

*Page*

28 U.S.C. §1343 ..... 3

28 U.S.C. §2201 ..... 6

42 U.S.C. §602(a) ..... 2

42 U.S.C. §603(a)(3) ..... 15

42 U.S.C. §644 ..... 2, 3, 8, 11, 15

42 U.S.C. §1983 ..... 4, 15

**Federal Rules:**

Fed. R. App. P. 41 ..... 9

**Miscellaneous:**

S. Rep. No. 94-36, 94 Cong. 1st Sess. II (1975) ..... 9

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix B, pp. 3a-16a infra) is reported at 731 F.2nd 105. The ruling or remedy and final order of April 22, 1983, is unreported (Appendix C, pp. 17a-31a infra). The opinion of the United States District Court of Connecticut (Appendix D, pp. 32a-49a infra) is reported at 560 F. Supp. 1101 (D. Conn. 1983).

## JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Appendix B, p. 2a) was entered on March 13, 1984. A timely petition for rehearing was denied on May 31, 1984 (Appendix A, p. 1a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

26 U.S.C. §43 appears in its entirety in footnote 3 of this petition; 26 U.S.C. §6401 appears in its entirety in footnote 13 of the ruling of the United States District Court of Jan. 14, 1983 (see Appendix D); 26 U.S.C. §6402 appears in its entirety in footnote 1 of the opinion of the Court of Appeals for the Second Circuit; and 42 U.S.C. §644 appears in its entirety in footnote 1 of the opinion of the Court of Appeals for the Second Circuit (see Appendix B).

## STATEMENT

The federal "tax intercept" program provides for the interception of refunds resulting from overpayment of taxes to be applied to child-support arrearages in cases where the child-support payments have been assigned to the state, pursuant to 42 U.S.C. §602(a).[1]

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[1]The pertinent provisions of 42 U.S.C. §602(a) appear in footnote 1 of the opinion of the United States Court of Appeals, Second Circuit (see Appendix B, p. 5a).

Interception of such tax refunds due individuals owing child-support obligations to a state was authorized by the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35 §2331.[2]

This suit originated in the United States District Court, District of Connecticut, as a class action seeking a declaratory judgment that the statutes and regulations as implemented were unconstitutional and requesting the court to require the defendants to protect the due-process rights of the plaintiffs by providing for notice and hearings prior to interception of tax refunds for a claimed child-support arrearage. The plaintiffs also requested that the District Court find that earned income credits available to certain low-income individuals are not subject to the tax intercept program.[3] Jurisdiction was conferred on the District court by 28 U.S.C. §1331, 28 U.S.C. §1343 (3) and (4), since this is an action arising under the

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[2]The text of §464 of the Social Security Act, 42 U.S.C. §664 (Supp. V, 1981), a part of §2331 of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, 95 Stat. 357 (1981), appears in footnote 1 of the opinion of the United States Court of Appeals, Second Circuit (see Appendix B, pp. 5a-7a).

[3]26 U.S.C. §43 provides:

"(a) Allowance of credit.—In the case of an eligible individual, there is allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 10 percent of so much of the earned income for the taxable year as does not exceed $5,000.

(b) Limitation.—The amount of the credit allowable to a taxpayer under subsection (1) for any taxable year shall not exceed the excess (if any) of—

(1) $500, over

(2) 12.5 percent of so much of the adjusted gross income (or, if greater, the earned income) of the taxpayer for the taxable year as exceeds $6,000.

(c) Definitions.—For purposes of this section—

(1) Eligible individual.—

(A) In general.—The term 'eligible individual' means an individual who, for the taxable year—

(i) is married (within the meaning of §143) and is

Constitution and laws of the United States. The plaintiffs' cause of action arises under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution.

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entitled to a deduction under §151 for a child (within the meaning of §151(e)(3)),

(ii) is a surviving spouse (as determined under §2(a)), or

(iii) is a head of a household (as determined under subsection (b) of §2 without regard to subparagraphs (A)(ii) and (B) of paragraph (1) of such subsection).

(B) Child must reside with taxpayer in the United States.—An individual shall be treated as satisfying clause (i) of subparagraph (A) only if the child has the same principal place of abode as the individual and such abode is in the United States. An individual shall be treated as satisfying clause (ii) or (iii) of subparagraph (A) only if the household in question is in the United States.

(C) Individual who claims benefits of §911 or 931 not eligible individual.—The term 'eligible individual' does not include an individual who, for the taxable year, claims the benefits of—

(i) §911 (relating to citizens or residents of the United States living abroad),

(ii) §931 (relating to income from sources within possessions of the United States).

(2) Earned income.—

(A) The term 'earned income' means—

(i) wages, salaried, tips, and other employee compensation, plus

(ii) the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of §1402(a)).

(B) For purposes of subparagraph (A)—

(i) the earned income of an individual shall be computed without regard to any community property laws,

(ii) no amount received as a pension or annuity shall be taken into account, and

(iii) no amount to which §871(a) applies (relating to

Both the federal and state defendants raised jurisdictional arguments before the District Court claiming: (1) that the action was barred by the failure of the plaintiffs to comply with the jurisdictional requirements of §7422(a) of the Internal Revenue Code of 1954 which provides that no suit shall be maintained for the recovery of a tax paid until a claim for refund has been filed with the Internal Revenue Service; (2) that the Anti-Injunction Act,

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income of nonresident alien individuals not connected with United States business) shall be taken into account.

(d) Married individuals.—In the case of an individual who is married within the meaning of §143), this section shall apply only if a joint return is filed for the taxable year under §6013.

(e) Taxable year must be full taxable year.—Except in the case of a taxable year closed by reason of the death of the taxpayer, no credit shall be allowable under this section in the case of a taxable year covering a period of less than 12 months.

(f) Amount of credit to be determined under tables.—

(1) In general.—The amount of the credit allowed by this section shall be determined under tables prescribed by the Secretary.

(2) Requirements for tables.—The tables prescribed under paragraph (1) shall reflect the provisions of subsections (a) and (b) and shall have income brackets of not greater than $50 each—

(A) for earned income between $0 and $10,000, and

(B) for adjusted gross income between $6,000 and $10,000.

(g) Coordination with advance payments of earned income credit.—

(1) Recapture of excess advance payments.—If any payment is made to the individual by an employer under §3507 during any calendar year, then the tax imposed by this chapter for the individual's last taxable year beginning in such calendar year shall be increased by the aggregate amount of such payments.

(2) Reconciliation of payments advanced and credit allowed.—Any increase in tax under paragraph (1) shall not be treated as tax imposed by this chapter for purposes of determining the amount of any credit (other than the credit allowed by subsection (a)) allowable under this subpart."

§7421(a) barred the action; and (3) that 28 U.S.C. §2201 (1976), the "Declaratory Judgment Act," precludes declaratory relief "with respect to federal taxes."

The defendants contested in the District Court some of the general claims made by the plaintiffs that their right under the due-process clause of the Fourteenth Amendment to the United States Constitution had been violated by the operation of the tax intercept program.

The state defendant raised the Eleventh Amendment to the United States Constitution as a defense to any claim made by the plaintiffs to retroactive recovery.

Lastly, the plaintiffs claimed in the District Court that the statutes implementing the tax intercept program did not authorize interception of that portion of a refund for overpayment of taxes attributable to an earned income credit.

On January 14, 1983, the District Court, Ellen B. Burns, Judge, in a "Ruling on Federal Defendant's Motion to Dismiss, Plaintiffs' Motion For Class Certification and Cross Motions For Summary Judgment," reported as *Nelson v. Regan*, 560 F.Supp. 1011 (D.Conn.1983) (Appendix D), rejected the defendants' jurisdictional arguments. The Court certified as a class all those persons "who have had or will have their tax refunds intercepted and paid over to the State of Connecticut" and rejected the state's claim of immunity under the Eleventh Amendment. *Id.* at 1105. (Appendix D, p. 36a) The Court recognized due-process requirements for notice and hearings for all those persons whose tax refunds were subject to interception. The District Court also ruled that earned income credits due individuals as part of their refund from the Internal Revenue Service were not subject to the intercept program. *Id.* at 1109-1111, (Appendix D, pp. 45a-48a).

On April 22, 1983, the District Court issued its Ruling on Remedy and Final Order, which is unreported (Appendix C). In the April 22, 1983 ruling, the District Court rejected the federal defendant's motion for reconsideration of the Court's prior ruling and set forth specific requirements for pre-offset notice and hearings for persons subject to the intercept program. The Court, in its April 22nd Final Order, re-affirmed its ruling that earned income credits were not subject to interception for past-due support, but stayed the effect of that ruling until after appeal to the United States Court of Appeals for the Second Circuit (Appendix C, pp. 19a-20a). The Court ordered the state to send pre-offset notices to all persons who may be subject to the tax offset program and provisions for administrative hearings. The Court also ordered notifications to be sent to all persons whose 1981 tax refunds were intercepted informing them of their right to an administrative hearing by the state (Appendix C, p. 29a).

The April 22nd Final Order required the Internal Revenue Service to refund a non-obligated spouse's portion of an intercepted tax refund in the case of a joint return and to refund earned income credits to eligible individuals if the Court's ruling is upheld on appeal (Appendix C, p. 29a). The Court stated that there was no immediate Eleventh Amendment issue because if the Court's ruling on earned income credits is upheld, "only the Internal Revenue Service and not the state will be responsible for making refunds to individuals" (Appendix C, p. 24a-25a).

An appeal was taken by both federal defendants and the state defendants to the United States Court of Appeals for the Second Circuit. The federal defendants appealed the District Court's ruling on the jurisdictional grounds argued before the District Court, except for the argument that the action was barred by the Anti-Injunction Act, §7421(a) of the Internal Revenue Code of 1954, which was not renewed on appeal. The federal defendants appealed the District Court's ruling certifying as class plaintiffs persons subject, or who may be subject, to the intercept program. The

federal defendants also appealed the Court's ruling on earned income credits.

The state defendant appealed the District Court's ruling that the portion of a refund for overpayment from the Internal Revenue Service attributable to earned income credits were not subject to the intercept program, appealed the District court's holding that its decision did not amount to a retroactive recovery prohibited by the Eleventh Amendment, and renewed the jurisdictional argument raised in the District Court.

On March 13, 1984, in a decision reported as *Nelson v. Regan*, 731 F.2d 105 (2dCir.1984), (Appendix B), the United States Court of Appeals, Second Circuit, affirmed the District Court's decision in all the issues raised on appeal.

The Court of Appeals, in its ruling on earned income credits, agreed with the District Court that 26 U.S.C. §6402(c), which provides for offset of past-due child support against overpayment of taxes, limited the offset to actual taxes that were overpaid. The Court based its reasoning on the language of §6402(c) which authorized the offset against "the amount of any overpayment to be refunded to the person making the overpayment." The Court also noted the less inclusive language of 42 U.S.C. §664 which provides that the Secretary of Treasury "shall determine whether any amount as refunds of federal taxes paid" are payable to individuals who owe past-due child support assigned to a state. The Court, while conceding that the question was a "close one," reached its conclusion despite the language of 26 U.S.C. §6401(b)[1] which provides that earned income credits (and other credits) exceeding the tax imposed shall be considered an "overpayment" and 26 U.S.C. §6401(c) which provides that where there is no tax liability, the amount paid as a tax

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[1]The pertinent text of 26 U.S.C. §6401 appears in footnote 4 of the opinion of the Court of Appeals (Appendix B, p. 13a) and the full text in footnote 13 of the ruling of the District Court of Jan. 14, 1983 (Appendix D, p. 47a).

"shall not be considered not to constitute an overpayment" solely by reason of the fact that there was no tax liability in respect of which the tax was paid. 731 F.2d at 111. The Court also noted the case of *Sorenson v. Secretary of Treasury*, 557 F.Supp. 729, 734 (N.D. Wash. 1982) (appeal docketed, ND 83-3694) (9th Cir. argued Feb. 10, 1984), (Appendix E), reaching the conclusion that earned income credits are subject to interception.

The Court of Appeals supported its position that earned income credits were not subject to the intercept program by stating that the purpose of the credit was to provide "work-bonus" for families who paid little or no income tax, citing S. Rep. No. 94-36, 94 Cong., 1st Sess.II. *reprinted in* 1975 U.S. Code Cong. & Ad News 54, 63-64. 731 F.2d at 110, 111.

The Court of Appeals also upheld the District Court in its ruling on the state's Eleventh Amendment claim of immunity. The Court of Appeals, as did the District Court, took the position that whether a class member receives retroactive benefits rests entirely with the state. The Court, citing *Quern v. Jordan*, 440 U.S. 332, 347 (1979), and *Milliken v. Bradley*, 433 U.S. 267 (1977), (Appendix B, pp. 11a-12a), noted that the fact that the state will incur adminstrative expenses does not violate the Eleventh Amendment.

On May 31, 1984, the Court of Appeals denied the state defendant's petition for rehearing and suggestion that the case be heard in banc, (Appendix A). On June 14, 1984, the Court of Appeals pursuant to Rule 41 of the Federal Rules of Appellate Procedure, stayed its mandate pending application to the United States Supreme Court for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### I

THE TERM "OVERPAYMENT" INCLUDES EARNED INCOME CREDITS FOR THE PURPOSE OF THE TAX INTERCEPT PROGRAM WHEREIN INCOME TAX REFUNDS ARE OFFSET AGAINST PAST-DUE CHILD SUPPORT AND THAT THEREFORE SUCH EARNED INCOME CREDITS ARE SUBJECT TO OFFSET CONTRARY TO THE RULING OF THE SECOND CIRCUIT COURT OF APPEALS.

Earned income credits are available in the case of eligible individuals, as a credit against income taxes based on a percentage of the taxpayer's income under §43(a) of the Internal Revenue Code. The maximum credit allowable is $500, and the credit is reduced proportionately to the extent the taxpayer's income exceeds $6,000 but is less than $10,000, 26 U.S.C. §43(b).

Amounts to be paid an individual as an earned income credit are paid as a refund of taxes and are considered an "overpayment." 26 U.S.C. §6401. See text in footnote 4, *Nelson v. Regan*, 731 F.2d 105, 111 (Appendix B, p. 13a) and footnote 13, *Nelson v. Regan*, 731 Fed.Sup. 1101 (D. Conn. 1983) (Appendix D, p. 47a).

Congress provided for the interception of all "overpayments" to satisfy delinquent support obligations assigned to the state by the adoption of the Omnibus Budget Reconciliation Act of 1981 which added 26 U.S.C. §6402(c) since §6402(c) refers to the interception of the "overpayment" for delinquent support.

The District Court's ruling of January 14, 1983 claimed that there was an ambiguity involving the use of the word "overpayment" in 26 U.S.C. §6402. Judge Burns interpreted the phrase "overpayment to be refunded to the person making the overpayment" as stated in §6402(c) as limiting the definition of overpayment. *Nelson v.*

*Regan*, 560 Fed. Supp. 1101 at 1110 (Appendix D, p. 48a). Apparently the District Court interprets the phrase as meaning that if an overpayment is not "made", i.e. actually paid to the Internal Revenue Service, the Internal Revenue Service may not offset against it. The Second Circuit by implication adopted the reasoning of the District Court in *Nelson v. Regan*, supra. The petitioner maintains that the definition of "overpayment" in 26 U.S.C. §6401 precludes the interpretation that the overpayment must be "made." If Congress intended to change the definition of "overpayment" for the purpose of the intercept program to meaning actually paid to the Internal Revenue Service, they would have done it directly, rather than as the District Court and the Second Circuit appear to suggest. If 26 U.S.C. §6402(c) does not limit interception of an overpayment to taxes actually paid, then 42 U.S.C. §664(a) does not support the District Court and the Second Circuit holding. 26 U.S.C. §664(a), §464(a) of the Social Security Act is a parallel provision to §6402(c). There is nothing in its legislative history which indicates that in using the term "refund of taxes paid" Congress intended to cut back in the mandate to Internal Revenue Service in §6402(c) to offset the amount of any *overpayment* against past-due support. An excess earned income credit is a refundable overpayment of tax under the Internal Revenue Code. There is no basis for excluding amounts owed to the taxpayers as earned income credits from the support offset program.

When the will of Congress has been expressed in reasonably plain terms, "that language must be regarded as conclusive" *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) citing *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). In the instant case, the term "overpayment" has been defined by Congress as including earned income credits (26 U.S.C. §6401(b)) and Congress has authorized such "overpayment" to be offset against past-due support (26 U.S.C. §6402(c)).

The Second Circuit Court of Appeals in *Nelson v. Regan*, supra, in limiting the definition of "overpayment" concluded that these "overpayments" were not subject to the intercept program. The

Court justified its ruling by adopting the Congressional purpose of providing an incentive for low-income people to work rather than collect federal assistance. Both the Court's holding and reasoning are clearly erroneous. This holding does not coincide with the plain meaning established by Congress. The language of the statutes clearly indicates that earned income credits are subject to the tax intercept program. Likewise, the Court failed to recognize the fact that other Congressional purposes may take priority over another purpose.

In *Sorenson v. Secretary of Treasury of the United States*, 557 F.Supp. 729 (W.D. Wash. 1982), appeal docketed No. 83-3694, 9th Circuit, argued Feb. 10, 1984, the Court rejected the plaintiff's argument that earned income credits fall outside the statutes and are not subject to intercept. In its discussion of the issue, the Court described "overpayment" as a term with a specific interpretation as explained in 26 U.S.C. §6401(b). Using the clear intent of congress, the Court concluded that ". . . earned income credits are within the purview of the statutes and are subject to retention and transfer."

The *Sorenson* Court also addressed the issue of Congressional intent. The Court concluded that Congress would consider the payment of past-due child support as more important than the protection of earned income credits. Therefore, it is proper for such income credits to be subject to the intercept program. *Id.* at 734. The *Sorenson* Court stated:

"It is perfectly consistent that Congress would consider the payment of past-due child support more important than the protection of earned income credit."

More recently the District Court in Colorado reached a similar decision. In *Rucker v. Secretary of the Treasury of the United States*, 555 F.Supp. 1051 (D. Colo. 1983), appeal pending 10th Circuit, the Court cited the *Sorenson* case with approval. The Court concluded

that "it is consistent with public policy that past-due child support payments take priority before earned income credits, and that they are intercepted fairly, on a proportionate basis, in order to achieve that goal." Id. at 1053.

A similar decision was reached by the District Court of Maine, where the Court ruled that earned income credits are properly subject to interception. *Coughlin v. Regan*, 10 Fam. L.R. 1371 (U.S.D.C. Maine, 4/11/84).

The petitioner maintains that the Court in *Sorenson* reached the correct statutory construction in holding that earned income credits were subject to the intercept program. If a person claims to be supporting a dependant, which is a necessary prerequisite to obtaining an earned income credit, 26 U.S.C. §43(c), it is only just that the portion of his tax refund attributable to earned income credit be offset against the arrearage due for support of a dependent the taxpayer is not supporting, together with the rest of his refund for an "overpayment." Petitioner believes it was the Congressional intent that earned income credits would be subject to interception for past-due support along with the rest of the tax refund; this intent is expressed by the language of §6402(c) of the Internal Revenue Code adopted in the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357, 861, which authorizes offset of overdue child support obligations assigned to the state against "the amount of any overpayment to be refunded," Congress having previously defined an "overpayment" as including earned income credits in §6401(b) of the Internal Revenue Code.

If the Ninth Circuit Court of Appeals upholds the District Court's ruling on earned income credits in the *Sorenson* case, or the Tenth Circuit Court of Appeals upholds the District Court in *Rucker* in their rulings on earned income credits, there will exist a conflict between the Circuits on the question whether the statutes involved subject earned income credits to interception for past-due child support by the Internal Revenue Service. However, regardless of

the outcome in *Sorenson* or *Rucker*, the decision of the Court of Appeals for the Second Circuit regarding earned income credits and the program for interception of tax refunds for past-due child support involves an important question of federal law affecting all fifty of the states which should be resolved by this Court so that the tax-intercept program will be administered uniformally throughout the United States.

## II

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT THAT PERSONS WHO CLAIMED EARNED INCOME CREDITS AS PART OF THEIR TAX OVERPAYMENT AND WHOSE TAX REFUNDS WERE INTERCEPTED FOR PAST-DUE CHILD SUPPORT ASSIGNED TO THE STATE OF CONNECTICUT WERE ENTITLED TO REIMBURSEMENT OF THAT PORTION OF THEIR TAX REFUND ATTRIBUTABLE TO EARNED INCOME CREDITS, VIOLATES THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS SUCH DECISION WILL RESULT IN THE RECOVERY OF DAMAGES FROM THE STATE.

Any suit for damages against a sovereign state or state agency is barred by the Eleventh Amendment unless the state consents to the suit or a waiver of the state's immunity can be found. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). See also *State of Alabama v. Pugh*, 438 U.S. 781 (1978). In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court interpreted this provision to apply to suits against a state by an instate citizen even though the language of the Eleventh Amendment prohibits only suits against a state by citizens of another state.

In a long line of cases, the Supreme Court has enunciated the rule that any suit against a sovereign state or state agency is barred by the

Eleventh Amendment unless the state consents to the suit or a waiver of the state's immunity can be found. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).

While Congress, acting under the Fourteenth Amendment, has the power to waive the state's immunity to suit, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), no such waiver is evidenced in any Congressional enactment under the Social Security Act, *Edelman v. Jordan*, supra. Moreover, a state is not a "person" for purposes of 42 U.S.C. §1983 such that waiver may be inferred under the statute. *Quern v. Jordan*, 440 U.S. 332 (1979). While the Fourteenth Amendment itself imposes certain limitations upon the several states, that provision standing alone, absent Congressional action, is not a limitation upon the jurisdictional bar of the Eleventh Amendment. *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977).

In the present case, Connecticut has not consented to the suit, and there is no waiver of the state's immunity.

The District Court stated that it would be the Internal Revenue Service, not the state, which would be making refunds for the earned income credits previously paid to the state. Connecticut, though, is participating in a joint federal-state program wherein the federal government contributes, pursuant to 42 U.S.C. §603(a)(3), an amount equal to the sum expended by the state in its Aid to Families With Dependent Children program. Money is withheld from refunds intercepted by the Secretary of Treasury and paid to the state under 42 U.S.C. §664(a). There are numerous routes that the federal government can pursue to enforce obligations it may construe as owed to it by a state participating in the Aid to Families With Dependent Children program, including the tax intercept program. If the Internal Revenue Service makes refunds to those persons whose tax refunds were intercepted for past-due child

support, the Internal Revenue Service would easily obtain reimbursement; the Internal Revenue Service would simply debit the amount due the Internal Revenue Service from moneys to be received by the state in future years under the tax intercept program. Although the District Court stated that the Internal Revenue Service, not the state, would be making the refunds, the Court of Appeals, like the District court, refused to distinguish between the relatively minor cost of administrative hearings which may not violate this Court's interpretation of the Eleventh Amendment under the doctrine enunciated in *Quern v. Jordan, supra* at 348, and *Milliken v. Bradley,* 443 U.S. 267 (1977) and the potential exposure to much larger costs resulting from refund of earned income credits.

The amount of tax overpayments attributable to earned income credits cannot be estimated from any material that was available at the time of the proceedings in the District Court. However, in the record, and in the joint appendix filed with the Court of Appeals, is evidence that for the taxable year 1981, the state certified 20,280 names of individuals delinquent in child support to the Internal Revenue Service, and $6,157,060.40 was intercepted for past-due child support assigned to the State of Connecticut, of which $508,842.85 was refunded because persons had paid their child-support arrearages or were certified in error.[5]

The Court of Appeals, therefore, erroneously upheld the District Court's ruling that the Eleventh Amendment is not a jurisdictional bar to the retroactive reimbursement of earned income credits to persons whose tax refunds were previously offset against past-due support assigned to the state.

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[5]See affidavit of Anthony DiNallo, Chief, Child Support Unit, Department of Human Resources, State of Connecticut, dated September 13, 1982, filed in the District Court in support of Defendant Manning's Motion for Summary Judgment, which was contained in the joint appendix filed in the Second Circuit in this case (Appendix F, pp. 69a, 71a).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH I. LIEBERMAN
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84-33

No.

Office-Supreme Court, U.S.
FILED
JUL 9 1984
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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RONALD MANNING, Commissioner of the
Department of Human Resources of
the State of Connecticut,

*Petitioner*

*v.*

ELINOR NELSON, DOUGLAS SPELLS,
DENNIS EATON, PHILLIP CORSO,
Individually and on behalf of
those similary situated.

*Respondents*

---

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH I. LIEBERMAN, *Attorney General*

By: JOSEPH X. DUMOND, JR.
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## APPENDIX A

UNITED STATES COURT OF APPEALS

FILED MAY 31, 1984
ELAINE B. GOLDSMITH, Clerk

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of May, one thousand nine hundred and eighty-four.

| | | |
|---|---|---|
| ELINOR NELSON, DOUGLAS SPELLS, DENNIS EATON, PHILLIP CORSO, individually and on behalf of those similarly situated, *Plaintiffs-Appellees,* | : | |
| *v.* | : | No. 83-6170 |
| DONALD REGAN, Sec. of U.S. Dept. of Treasury, RICHARD SCHWEIKER, in his capacity of Sec. of U.S. Dept. of Health and Human Services, and RONALD MANNING, Commissioner of the Dept. of Human Resources of State of Connecticut, *Defendants-Appellants.* | : | |

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the defendants-appellants, Ronald Manning, Commissioner of the Department of Human Resources of the State of Connecticut.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
*Clerk*

## APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 409, 410—August Term, 1983

(Argued November 16, 1983 Decided March 13, 1984)

Docket Nos. 83-6170, 83-6240

---

ELINOR NELSON, DOUGLAS SPELLS, DENNIS EATON, PHILLIP CORSO, individually and on behalf of those similarly situated,

*Appellees,*

*v.*

DONALD REGAN, Secretary of the United States Department of Treasury; MARGARET M. HECKLER, Secretary of the United States Department of Health and Human Services; and RONALD MANNING, Commissioner of the Department of Human Resources of the State of Connecticut,

*Appellants.*

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Before:

OAKES and MESKILL, *Circuit Judges,*
and NEAHER, *District Judge.**

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*Of the Eastern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, denying defendants' motions to dismiss for lack of jurisdiction, and issuing a declaratory judgment for the plaintiffs, on the grounds that the tax intercept program violated the plaintiffs' due process rights to notice and a hearing and that portions of tax refunds attributable to earned income credits were not subject to the program.

Judgment affirmed.

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JO-ANN HORN, Tax Division, Department of Justice, Washington, D.C. (Glenn L. Archer, Jr., Assistant Attorney General; Alan H. Nevas, United States Attorney for the District of Connecticut; Michael L. Paup, Richard Farber, Department of Justice, Washington, D.C., of counsel), *for Federal Appellants*.

JOSEPH X. DUMOND, JR., Assistant Attorney General, Hartford, CT (Joseph I. Lieberman, Attorney General, Paige J. Everin, Assistant Attorney General, Hartford, CT, of counsel), *for State Appellants*.

MICHAEL O. SHEEHAN, New Haven Legal Assistants Association, Inc., New Haven, CT (Joanne Miner, Connecticut Legal Services, Danielson, CT), *for Appellees*.

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OAKES, *Circuit Judge*:

This appeal involves the so-called "tax intercept" program. Under this program, federal tax refunds due to persons who have failed to make support payments, the rights to which have been assigned to a state that has provided aid to those to whom support is due, are "intercepted" by the Internal Revenue Service on the state's behalf. Accordingly, the tax refunds which would ordinarily go to the non-support paying taxpayer are instead paid to the state which, under the aid-to-needy-families-with-children program, has in effect met the individual's obligations.[1]

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[1]42 U.S.C. §602(a) (1976) provides in part:

A State plan for aid and services to needy families with children must . . . (26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed. . . .

Section 464 of the Social Security Act, 42 U.S.C. §644 (Supp. V. 1981), a part of §2331 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981), provides:

Collection of past-due support from Federal tax refunds

(a) Procedures applicable; distribution

Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to §602(a)(26) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with §657(b)(3) of this title.

(b) Regulations; contents, etc.

The Secretary of the Treasury shall issue regulations, approved by the

A class action was instituted by four individuals ("the taxpayers") against the Secretary of the Treasury, the Secretary of Health and Human Services, and the Commissioner of the Connecticut Department of Human Resources. The class consists of persons whose refunds which are due and owing have been withheld by the IRS, so

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Secretary of Health and Human Services, prescribing the time or times at which States must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall specify the minimum amount of past-due support to which the offset procedure established by subsection (a) of this section may be applied, and the fee that a State must pay to reimburse the Secretary of the Treasury for the full cost of applying the offset procedure, and provide that the Secretary of the Treasury will advise the Sectretary of Health and Human Services, not less frequently than annually, of the States which have furnished notices of past-due support under subsection (a) of this section, the number of cases in each State with respect to which such notices have been furnished, the amount of support sought to be collected under this subsection by each State, and the amount of such collections actually made in the case of each State.

(c) Definition

As used in this part the term "past-due support" means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living.

26 U.S.C. §6402 (1976 & Supp. V 1981), as amended, also a part of §2331 of the Omnibus Budget Reconciliation Act of 1981, provides:

Authority to make credits or refunds

(a) General rule

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsection (c), refund any balance to such person.

(b) Credits against estimated tax

The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the

that the refunds could be offset against the amount of child support owed to the State of Connecticut. The taxpayers complain that §6402(c) of the Internal Revenue Code, *supra* note 1, and its counterpart §464(a) of the Social Security Act, *supra* note 1, deprive them of their property without due process of law in that the state does not give them notice or an opportunity for a pre-offset hearing. They also allege that to the extent that their refunds were attributable to the earned income credit provided by §43 of the Internal Revenue Code, 26 U.S.C. §43 (1976), the refunds were outside the scope of the intercept program. Finally, they claim that in cases involving joint income tax returns, the Internal Revenue Service failed to apportion overpayments reflected as between the spouse obligated for the past due child support and the nonobligated spouse, consequently failing to refund the portion of overpayments attributable to nonobligated spouses.

The government conceded in the district court that an apportionment was necessary in the case of a joint return. The government advised the court that upon receipt of a claim for refund filed by the nonobligated spouse, the IRS in the future would compute the portion of the overpayment attributable to the spouse and refund

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amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

(c) Offset to past-due support against overpayments

The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in §464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with §464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

that portion. *See* Rev. Rul. 74-611, 1974-2 C.B. 399 and Rev. Rul. 80-7, 1980-1 C.B. 296.

On January 14, 1983, the district court, Ellen Bree Burns, Judge, issued a ruling reported as *Nelson v. Regan*, 560 F. Supp. 1101 (D. Conn. 1983). The court denied the defendants' motions to dismiss for lack of jurisdiction, and certified the suit as a class action. It also ruled on cross-motions for summary judgment, and issued a declaratory judgment that the intercept program, as implemented by the State of Connecticut, violated the due process rights of the plaintiff class. In particular, the court held that the intercept program did not meet due process requirements for notice of possible defenses and procedures for asserting those defenses. It held further that the state must provide an opportunity for the taxpayers to be heard at a meaningful time and in a meaningful manner. The court also rejected the State's claim that the Eleventh Amendment would be violated by requiring a hearing, holding that the cost of providing notice and administrative hearings are ancillary and not barred by the Eleventh Amendment. Finally, with regard to the substantive defense raised by taxpayers, the court held that refunds attributable to the earned income credit were not overpayments for the purposes of §6402(c), and therefore that such payments could not be intercepted.

On April 22, 1983, the court issued its "Ruling on Remedy and Final Order," denying the federal defendants' motion for reconsideration of the prior ruling on jurisdiction and holding that amounts owed an individual as an earned income credit are not overpayments for purposes of §6402(c). The court went on to set forth detailed notice and hearing requirements, including a requirement that in the case of joint returns, the nonobligated spouse must be notified individually of his or her right to apply for a refund. Accepting a subsequent stipulation of the parties on June 13, 1983, the court amended its April 22 order to eliminate the requirement of mailing individual notices to nonobligated spouses in the case of joint returns.

On appeal the federal defendants renew their jurisdictional claims. They argue first that to the extent the taxpayers sought a refund of their claimed overpayments, their suit is barred for failure to comply with the jurisdictional requirements of §7422(a) of the Internal Revenue Code of 1954,[2] which states that no suit may be maintained for the recovery of any tax until a claim for refund has been duly filed with the IRS. Thus, they argue, any refund suit instituted prior to the filing of a claim for refund, or after the claim has been filed but prior to the expiration of the six-month period set forth in §6532 of the Code, 26 U.S.C. §6532(a)(1) (1976), is outside the scope of the government's consent to be sued and, accordingly, is barred by the doctrine of sovereign immunity. *See, e.g., Altman v. Connally,* 456 F.2d 1114 (2d Cir. 1972). *See also United States v. Freedman* 444 F.2d 1387, 1388 (9th Cir.), *cert. denied,* 404 U.S. 992 (1971).

We agree with the district court that the intercept program does not involve a claim that a tax has been "erroneously or illegally assessed or collected" within the meaning of 26 U.S.C. §7422(a). There is no dispute as to the amount of the taxpayers' federal tax liability, nor as to the amount of refund to which they are entitled. As Judge Burns said, "the federal-state intercept program takes effect only after the assessment and collection of federal income taxes. The federal government at that point has no interest in the

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[2] I.R.C. §7422(a) states:

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. §7422(a) (1976).

refunds." 560 F. Supp. at 1103. We think the district court's reasoning on this point is eminently sensible. *See id.* at 1104 & n.2.[3]

The federal defendants next argue that the district court lacked jurisdiction to grant declaratory relief because 28 U.S.C. §2201 (1976), which authorizes declaratory relief, precludes such relief, "with respect to Federal taxes." *See, e.g., Jolles Foundation, Inc. v. Moysey,* 250 F.2d 166, 169 (2d Cir. 1957). Moreover, they contend that the Treasury Regulations promulgated under §6402(c), *supra* note 1, provide that "[p]ast-due support shall be collected by offset under §6402(c) and this section in the same manner as if it were a liability for tax imposed by the Internal Revenue Code of 1954...." 48 Fed. Reg. 22708, 22709 (1983) (to be codified at 26 C.F.R. §301.6402-5(a)(1)). Thus, they argue, disputes concerning the withholding of refunds must be litigated in a properly instituted suit for refund, a variation of their argument under §7422 of the Internal Revenue Code.

As noted by the district court, the Declaratory Judgment Act's prohibition against relief "with respect to Federal taxes," like the Anti-Injunction Act, is designed to protect the "Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Bob Jones University v. Simon,* 416 U.S. 725, 736 (1974) (referring to purpose of Anti-Injunction Act). This need is not involved here, since the intercept program takes place only after the assessment and collection of taxes. *See* 560 F. Supp. at 1103-04. That the Treasury Regulations treat the offset for past due support as if it were a liability for tax does not make the instant suit one for a refund. The only relief sought against the Secretary of Treasury or given by the court below is to order him to refrain from transferring the tax overpayment to the Connecticut Department of Human Resources

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[3]In the court below the federal defendants made the argument that the action is barred by the Anti-Injunction Act, §7421(a) of the Internal Revenue Code of 1954. They have not renewed this argument on appeal.

until the class members have been notified by the State of the intercept program and have been given an opportunity by the State to challenge an offset at a hearing.

The federal defendants raise still another version of this argument which concedes that the Anti-Injunction Act is inapplicable. They argue that there can be no injunctive relief here because there is an adequate legal remedy available to the taxpayers, namely a suit for a refund. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). What the taxpayers seek is not a refund, however, but notice and an opportunity to contest the State's offset rights at the state level before the IRS pays their tax refunds to the State. A suit for refund would not provide such relief. To the extent that *Vidra v. Egger*, 51 A.F.T.R.2d (P-H) 913 (E.D. Pa. Dec. 8, 1982), is to the contrary, we disagree with it.

In addition, the federal defendants claim that the district court erred in certifying this suit as a class action, relying on the view that no claim for refund has been filed with the IRS under §7422(a) and thus that the suit was premature under §6532. *See Lewis v. Sandler*, 498 F.2d 395, 399-400 (4th Cir. 1974). As we have previously said, however, this is not a suit for a refund. The case, rather, involves statutory procedures whereby a third party, consisting in this instance of the state of Connecticut, intervenes to have property otherwise indisputably belonging to the taxpayer, a tax refund due and payable, diverted to it under the tax intercept program. The primary relief sought is against the State of Connecticut. Relief against the federal government requires only that the IRS provide information on the amount of tax refunds attributable to the nondelinquent spouse's income, a matter on which the parties have agreed, except as it involves earned income credits.

We also think the court reached the correct result in ruling on the State's Eleventh Amendment claim of immunity. To be sure, a sovereign state or state agency cannot be sued for damages under the Eleventh Amendment without its consent or in the absence of a

waiver of immunity, at least when payments out of its treasury are sought. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459 (1945). *See also State of Alabama v. Pugh*, 438 U.S. 781 (1978). The state defendants argue that the taxpayers seek a return of their refunds from the State, but this is not the case at all. What they seek is injunctive relief against the State in connection with the procedures by which their refunds due from the federal government are intercepted. As in *Quern v. Jordan*, 440 U.S. 332, 348 (1979), whether a recipient of notice decides to take advantage of state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. Whether the class member receives retroactive benefits rests entirely with the state, its agencies, courts, and legislatures, not with the federal court. Moreover, the fact that the state will incur administrative expenses providing the required notice and hearing does not mean that the Eleventh Amendment is violated. *Quern*, 440 U.S. at 347; *see also Milliken v. Bradley*, 433 U.S. 267 (1977). For the reasons stated by the district court in ruling on the motion for class certification and the cross-motions for summary judgment, 560 F. Supp. 1105-09, we agree with the court's decision requiring notice and hearing to the individuals affected by the tax intercept program.

The district court also held that the tax intercept program does not apply to refunds or payments of earned income credits. The earned income credit was first enacted as §204(a) of Pub. L. 94-12, the Tax Reduction Act of 1975, 26 U.S.C. §43 (1976). As originally enacted, it allowed a credit in an amount equal to 10% of the first $4,000 earned by eligible individuals. To be eligible for the credit, a person had to have a dependent child residing with him or her.

The purpose of the credit was to provide a "work-bonus" for families who pay little or no income tax, are the most hurt by rising food and energy costs, and are subject to the social security payroll tax. S. Rep. No. 94-36, 94th Cong., 1st Sess. 11 (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 54, 63-64. The credit was

intended to provide an incentive for low income people to work rather than to receive federal assistance. It was also hoped that the credit would stimulate the economy because low income people were "expected to spend a large fraction of their increased disposable incomes." S. Rep. at 11, *reprinted in* U.S. Code Cong. & Ad. News at 64.

The difficult technical question we have before us is whether earned income credits are includable in the amount of the refund against which delinquent support payments may be offset under the intercept program. The district court, holding that the congressional purposes would be undercut if the credit were intercepted, read the word "overpayment," broadly defined in 26 U.S.C. §6401,[4] to be limited in 26 U.S.C. §6402, *supra* note 1, by the phrase "overpayment to be refunded to the person making the overpayment," along with the less inclusive phrase used in §464 of the Social Security Act, *supra* note 1. The court noted that the provisions of 26

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[4]26 *U.S.C.* §6401 (1976 & Supp. V 1981) provides as follows:

Amounts treated as overpayments

(a) Assessment and collection after limitation period.

The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b) Excessive credits

If the amount allowable as credits under §§31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit), exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the crdits allowable under §§31, 39, and 43), the amount of such excess shall be considered an overpayment. . . .

(c) Rule where no tax liability

An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

U.S.C. §6402 and 42 U.S.C. §664, but not 26 U.S.C. §6401, were part of §2331 of the Omnibus Budget Reconciliation Act of 1981, which established the tax intercept program. The court noted that in contrast §6401 was a general provision in the chapter on Abatements, Credits and Refunds of the Internal Revenue Code, governing the tax refund process. See 560 F. Supp. 1110-11. *But see Sorenson v. Secretary of Treasury*, 557 F. Supp. 729, 734 (N.D. Wash. 1982), (reaching conclusion that refunds due to earned income credit are subject to interception), *appeal docketed*, No. 83-3694 (9th Cir. Feb. 10, 1984).

We agree with Judge Burns. The statement by the *Sorenson* court, that the term "overpayment" is a "word of art," *id.*, does not meet Judge Burns' argument. Moreover, §6402(c) expressly relates back to §464 of the Social Security Act, which states that the Secretary of the Treasury shall determine whether any amounts "as refunds of Federal taxes paid" are payable to the taxpayer. 42 U.S.C. §664(a). Section 464(a) then goes on to refer to withholding "from such refunds" an amount equal to the past due support. Read together these two statutes support the district court's conclusion that the intercept provisions do not relate to earned income credits. This conclusion is fortified, as the district court pointed out, by the social welfare needs that Congress sought to meet in enacting the earned income credit.

Concededly, however, the question before us is a close one. We recognize that in the definition of "overpayment" in §6401(b) of the Code, *supra* note 4, express reference is had to the earned income credit for the purposes of computing an overpayment. We also take due note that 26 U.S.C. §6401(c) provides that "an amount paid as tax shall *not* be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid." (Emphasis supplied.)

We are also aware that our decision involves treating an earned income credit as an "overpayment" for some purposes though not

for purposes of the tax intercept statutes. Logic and symmetry have never been the hallmarks of the Internal Revenue Code and Social Security Act, however. Given the option provided by the congressional language of Internal Revenue Code §6401, on the one hand, and §6402 of the Code, coupled with §464 of the Social Security Act, on the other, we believe that the latter more appropriately accords with the congressional purpose in enacting the earned income credit. As pointed out by Judge Blumenfeld in holding that the earned income credit is not "property" of a bankrupt under the Bankruptcy Act:

> The values, variables and mechanisms expressed and enacted by the Congress . . . lead me to conclude unhesitantly that the earned income credit is not a tax refund. It is a payment made to low-income taxpayers to help them meet basic costs of life.

*In re Searles*, 445 F. Supp. 749, 755 (D. Conn, 1978).[5]

Judgment affirmed.

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[5]Judge Blumenfeld reasoned in part as follows:

When originally enacted, the earned income credit was to be taken into account as "other income" under the Social Security Act and thus would cause a reduction in payments of aid to families with dependent children for the month in which it was to be received. *See* S. Rep. No. 94-36 [94th Cong., 1st Sess.], at 35, *reprinted in* [1975] U.S. Code Cong. & Admin. News 54, 85-86. Congress later enacted §2(d) of the Revenue Adjustment Act of 1975, providing that funds received under I.R.C. §43

> "shall not be taken into account as income or receipts for purposes of determining . . . eligibility . . . or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds, but only if [the taxpayer] . . . is a recipient of benefits or assistance under such a program for the month before the month in which such refund is made."
>
> (Pub. L. No. 94-164 §2(d), 89 Stat. 970, 972 (1975).

Thus Congress indicated that needy families should receive the earned

income credit in addition to any public assistance they are eligible to receive at the time the credit is paid. This distinguishes the earned income credit from all other tax "refunds," which are considered "other income" for purposes of calculating eligibility for public assistance, and further emphasizes the importance to Congress of stimulating spending, supporting needy families, and providing an incentive to work through the earned income credit.

445 F. Supp. at 753.

## APPENDIX C

UNITED STATES DISTRICT COURT

Filed April 22, 1983—4:10 P.M.

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ELINOR NELSON, *et al* | : | |
| | : | |
| *v.* | : | Civil No. N-82-173 |
| | : | |
| DONALD REGAN, *et al* | : | |

## RULING ON REMEDY AND FINAL ORDER

On January 14, 1983, this Court found that the operation of the federal-state tax refund intercept program, Omnibus Budget Reconciliation Act of 1981, P.L. No. 97-35, §§2331, 2332, 95 Stat. 860-63, violated plaintiffs' due process rights. The Court also ordered the parties to submit proposed final orders, setting out an appropriate remedy including notice and procedures for a hearing. The parties have submitted proposed orders and briefs on the proposed remedies. The federal defendants also ask the Court to reconsider its January 14, 1983, ruling, in particular that part which held that Earned Income Credits (EIC) may not be intercepted under the program. All defendants ask this Court to stay the implementation of its ruling on the EIC.

In many respects, plaintiffs and defendants have agreed upon procedures which conform with the Due Process Clause of the Fourteenth Amendment. Several issues, however, are still in dispute and must be resolved by the Court. The Court will deal with the remaining issues in the following order:

(1) reconsideration of its ruling on the federal defendants' jurisdictional and sovereign immunity defenses and the treatment of the EIC;

(2) the treatment of non-obligated spouses who file joint returns and have their tax refunds intercepted;

(3) the treatment of those making current payments under a court order or wage execution;

(4) the treatment of those who have not assigned their support rights to the State;

(5) the appropriateness of injunctive relief against the Internal Revenue Service (IRS) and the Department of the Treasury;

(6) the State's Eleventh Amendment defense; and

(7) a stay of the Court's Order with respect to the interception of the EIC.

## I. FEDERAL DEFENDANTS' MOTION FOR RECONSIDERATION

Upon reconsideration, the Court declines to change its ruling on the federal defendants' motion to dismiss. This action challenges the procedures for intercepting tax refunds, not for collecting taxes, and is not barred by §6305(b) of the Internal Revenue Code of 1954 or by the Anti-Injunction Act, §7421(a) of the Internal Revenue Code. The doctrine of sovereign immunity, similarly, does not bar an action which alleges that agents of the Government have cooperated in a program which violates plaintiffs' constitutional rights.

The federal defendants' claim that plaintiffs fail to state a claim against them is, also, rejected. A complete and effective remedy for the plaintiffs cannot be guaranteed unless both federal defendants

are parties. Admittedly, the role of the Department of Health and Human Services (HHS) is limited to such actions as approving regulations issued by the Secretary of the Treasury, receipt and review of statistical reports, collecting fees from the state agency, and certifying names received from the State to the IRS. HHS has no obligation to send notices, provide hearings or make refunds to either taxpayers or the State. The existing federal statute and regulations envisage a largely ministerial role for HHS. *See* 42 U.S.C. §664, 45 C.F.R. §§302 and 303. Nevertheless, HHS's role is sufficient to support plaintiffs' action against HHS.

The IRS's role in implementing the program is clearly significant. Only the IRS can determine the share of a refund attributable to a non-obligated spouse or to an EIC. The IRS, also, is responsible for returning to the taxpayer the non-obligated spouse's refund or the EIC, even if the money has already been intercepted and sent to the State. Therefore, the IRS is necessarily implicated in the operation of the intercept program. Its motion to dismiss is denied.

The Court held, in its January 14, 1983, ruling, that the EIC is not subject to the tax refund intercept program. The federal defendants, in support of their motion for reconsideration, argue that the Court's interpretation of §6402(c) of the Internal Revenue Code leads logically to an unreasonable result. The Court disagrees.

The federal defendants note that §6402 is the only section of the Internal Revenue Code that authorizes the issuance of a refund to the taxpayer. Subsection (a) is the general provision authorizing the refund of overpayments not credited against any liability, subject to the provisions of subsection (c). Subsection (c), in turn, diminishes the refund to the taxpayer by the amount paid to the State under the intercept program. That is, the refund to the taxpayer is reduced to the extent that the taxpayer's past-due support obligation is paid to the State out of the overpayment of federal taxes paid, excluding the EIC.

In summary, the EIC is not part of an "overpayment to be refunded to the person making the overpayment," for the purposes of subsection (c). It is, however, part of the overpayment referred to in general terms in subsection (a). Section 6402(a) authorizes the issuance of a refund of an EIC to the taxpayer.

For these reasons, as well as its earlier view that Congress may have considered the protection of the working poor more important than the protection of the state's treasury, the Court reaffirms its holding that the EIC is not covered by the intercept program.

## II. THE TREATMENT OF NON-OBLIGATED SPOUSES

Defendants do not claim an interest in the share of the tax refund attributable to a non-obligated spouse filing a joint return. Rather, the issues before the Court are who should notify the non-obligated spouse of the possibility of tax refund interception, what form the notice should take, and how the refund should be implemented.

In October, 1982, the State notified those individuals whose names were certified to the IRS in 1982 that non-obligated spouses may apply to the IRS for their portion of the refund. The State's proposed notice for the tax year 1983 and thereafter includes similar advice. At the time of the tax filing, the IRS notifies the joint taxpayers that the non-obligated spouse may apply to the IRS for a refund. It does not, however, notify the non-obligated spouse individually.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). Where reasonably possible, notice must be given to the affected individual. In this case, the IRS admits it is able to notify the non-obligated spouse individually. If the IRS provides individual notice, the combined notices sent by the State and the IRS will conform with due process requirements for notice.

As the program is currently implemented, the IRS may transfer the taxpayer's support obligation to the State before the non-obligated spouse applies for a refund. IRS processing is programmed for offset prior to refunding the non-obligated spouse's portion and could only be changed at some cost in terms of money and time. Moreover, the current individual income tax forms do not provide sufficient information for the IRS to make a proper allocation of the refund between the spouses. A further delay in both intercepting the refunds for the State and returning the non-obligated spouse's portion may be expected if the IRS were required to provide a pre-offset allocation of the refund.[1]

A non-obligated taxpayer who, on the basis of the State's notice to his or her spouse, learns of the offset program, may file an application for a refund with the IRS at the time of filing a joint tax return. Interception of the obligated spouse's refund in such a case should not delay return of the non-obligated spouse's refund. Other non-obligated spouses may learn about the intercept program only at the time of filing. Delay in intercepting the taxpayer's refund would not expedite the return of the overpayment. On the basis of information given in the IRS notice to the non-obligated spouse at the time of filing, he or she may make the appropriate application for a refund to the IRS.

The Court sees no benefit to be gained in requiring pre-offset allocation of the non-obligated spouse's share of the refund. The IRS cannot be expected to provide notice to, as yet, unidentified non-obligated spouses. Moreover, the IRS has indicated its willingness to repay incorrectly intercepted refunds. With the exception of the required individual notice to the non-obligated spouse, the defendants' present procedure, where both state and federal defendants give notice of the non-obligated spouse's right to claim a portion of the refund and the IRS guarantees repayment, complies with the requirements of due process.

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[1]The IRS has no way of anticipating whether a taxpayer will file a joint return and cannot, therefore, notify non-obligated spouses in advance.

## III. THE TREATMENT OF TAXPAYERS MAKING CURRENT PAYMENTS UNDER A COURT ORDER OR WAGE EXECUTION

The state defendant certified some, but not all, individuals who were current in their payments under a court order or wage execution, although they were in arrears on their support obligations. The Omnibus Budget Reconciliation Act authorizes the interception of tax refunds without placing restrictions on other legal processes which may be available to recover an arrearage.

Plaintiffs do not claim that the Act prohibits the certification of individuals who are delinquent in their support obligations but making current payments under a court order or wage execution. Nor do plaintiffs allege that the certification of some but not others of this group constituted intentional and purposeful discrimination. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) (violation of the Equal Protection Clause of the Fourteenth Amendment requires a showing of purposeful discrimination). There is no basis, therefore, for notifying individuals of a possible defense to the interception of their tax refunds based upon a claim that they are making current payments under a court order or wage execution.

## IV. THE TREATMENT OF THOSE WHO HAVE NOT ASSIGNED THEIR SUPPORT RIGHTS TO THE STATE

Whether an individual has assigned support rights to the State is a question of fact. A determination of this fact is for the administrative agency hearing defenses to the offset of tax refunds and for the state courts. The State's notice of defenses need merely provide that the tax refund offset may be barred if the child support debt has not been assigned to the State.

## V. THE APPROPRIATENESS OF INJUNCTIVE RELIEF AGAINST THE IRS AND DEPARTMENT OF TREASURY

On January 14, 1983, this Court ruled on cross motions for summary judgment and held that the implementation of the tax

refund intercept program violated plaintiffs' due process rights. In its Ruling, the Court found that the EIC and refunds due non-obligated spouses may not be intercepted under the program.

Defendant Secretary of Treasury and the IRS must comply with the terms of the Omnibus Budget Reconciliation Act of 1981 and with due process. They must, therefore, establish procedures to insure that the non-obligated spouse's portion of a joint return be repaid after filing of the appropriate forms with the IRS. These procedures need not include pre-offset allocation of the non-obligated spouse's share so long as that spouse has individual notice of the refund application procedure and the IRS maintains its willingness to make the refunds.

Because of its decision on defendants' motion for a stay, the Court does not now require the IRS to implement its decision with respect to the EIC.

## VI. THE STATE'S ELEVENTH AMENDMENT DEFENSE

The State urges the Court to find that the Eleventh Amendment bars relief for the plaintiff class to the extent that relief affects years for which the State has already received intercepted refunds. Plaintiffs ask the Court to order the state defendant to send a notice to all individuals whose tax refunds were intercepted for the taxable year 1981 and to make administrative hearings available to those individuals.

Plaintiffs' proposed notice advises the recipients that they may raise various defenses to the interception of their tax refunds at an administrative hearing. Whether they take advantage of the available state procedures is left to the individual; whether the individual receives a tax refund retroactively depends on the State, its agencies and its courts.

The State estimates the cost of providing notice to those whose names were certified in 1981 at approximately $7,000. The State

would incur additional costs if it must provide administrative hearings to such individuals. This Court may not, the State argues, impose these costs upon it, as such an order would violate the Eleventh Amendment's prohibition against retroactive awards from the state treasury.

The Eleventh Amendment does not prohibit all orders which would entail some state expense. The Supreme Court, in *Quern v. Jordan*, 440 U.S. 332, 348 (1979), held that a notice apprising individuals of the existence of state administrative procedures in which to determine eligibility for past benefits does not violate the Eleventh Amendment. In that case, however, the State agreed that its costs were *de minimus*. *See Quern v. Jordan, supra* at 347 n. 19.

In this case, the State strongly objects to the costs it would have to bear if the Court orders relief for those whose names were certified in 1981. The $7,000 estimated cost of providing notices, along with the cost of hearings, do not add up to substantial administrative expense, especially in light of the multi-million dollar costs incidental to school desegregation which have been approved in cases like *Milliken v. Bradley*, 433 U.S. 267 (1977).

Even if the Court did not question the substantiality of the burden on the State, the Eleventh Amendment does not bar an expense which is incidental and ancillary to injunctive relief. *See Silva v. Vowell*, 621, F.2d 640, 652-53 (5th Cir. 1980) (it is the character of an expense, not the amount which determines whether or not there is an Eleventh Amendment issue). There is no question here of the Court's awarding monetary damages against the State. It is merely ordering notice and the availability of administrative procedures for those whose taxes were intercepted in the 1981 tax year. The ancillary costs associated with the notice and hearings are not barred by the Eleventh Amendment.

Because of the ruling, *infra*, on defendants' motions to stay, there is no immediate requirement that the State return individuals' EIC.

Therefore, there is no immediate Eleventh Amendment issue with respect to the EIC. In any event, if the Court's ruling on the EIC is upheld on appeal, only the IRS, and not the State, will be responsible for making refunds to individuals. At that time, the State may raise a new Eleventh Amendment bar to an order requiring it to notify all those whose EICs may have been intercepted. The costs of providing that notice, however, would appear to be incidental to injunctive relief and not barred.

The State defendant's Eleventh Amendment claim is, therefore, denied.

## VII. DEFENDANTS' MOTIONS TO STAY

Defendants move for a stay of the Court's ruling that the intercept program does not cover the EIC. A court may grant a stay during the pendency of an appeal in such cases and upon such terms "as it considers proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c). In determining whether or not to grant a stay, courts have required the moving party to show: "(1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that the other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970).

Notwithstanding its ruling that the Omnibus Budget Reconciliation Act of 1981 does not authorize the interception of the EIC, the Court recognizes that the relevant statutory provisions may be differently interpreted. Given the ambiguity of the statutory language, it is possible to conclude that Congress showed more concern for the protection of the State's treasury than for the working poor. Indeed, other courts have so found. *See Sorenson v. Secretary of Treasury*, No. C82-441C, slip op. (W.D. Wash. Dec. 28, 1982), *Rucker v. Secretary of Treasury*, No. 82-K-1450, slip. op. (D. Colo. Feb. 10, 1983). Although adhering to its original statutory interpre-

tation, this Court is unwilling to say conclusively that defendants are unlikely to prevail on appeal.

Should the Court deny defendants' request for a stay and the defendants were to prevail on appeal, the State defendant might be unable to recover retroactively the EICs paid to delinquent obligors. The State's recovery of the delinquent support obligations would thereby be delayed.

The IRS also claims that it would be severely burdened by immediate implementation of the Court's ruling on the EIC. Only those taxpayers who are delinquent in their support obligations to Connecticut residents are involved. Those taxpayers do not necessarily reside in Connecticut or pay taxes through the same federal tax processing center. Conceivably the obligated taxpayers live in every region of the country. Therefore, immediate implementation of the ruling would require the IRS to make procedural changes throughout the country to deal with those taxpayers who have Connecticut obligations. The IRS's accommodation to this Court's ruling might be both costly and unnecessary.

Plaintiffs, who are, by definition, working poor, will be harmed by a stay, but not substantially so. They are neither so poor as to be at the very margin of subsistence nor without a remedy should they prevail on appeal. The IRS has indicated a willingness to pay the EIC to the individuals should they prevail.

Inconsistent interpretation of federal tax law and, in particular, inconsistent application of the tax refund intercept program to the EIC perforce causes public confusion and may cause disrespect for the law. Of the courts known to have dealt with the issue, this one appears to be alone in excluding the EIC from the intercept program.

This is a case where immediate implementation of the Court's ruling could cause substantial confusion and place costly and poten-

tially needless administrative burdens on the IRS. Plaintiffs will be able to recover their temporary financial loss if they win on appeal. Therefore, in the public interest, defendants' motion to stay the implementation of the Court's ruling on the EIC is stayed pending the outcome of the appeal to the Circuit Court and review by the Supreme Court, if any.

## FINAL ORDER

In accordamce with this ruling and the ruling issued January 14, 1983, it is hereby ordered, adjudged and decreed:

The Court finds that the plaintiffs' due process rights protected by the Fifth and Fourteenth Amendments were violated by the defendants in their implementation of the federal-state "intercept" program authorized by the Omnibus Budget Reconciliation Act of 1981, P.L. No. 97-35, §2331, 2332, 95 Stat. 860-63 for the reasons set forth in this Court's ruling of January 14, 1983, on federal defendant's Motion to Dismiss, plaintiffs' Motion for Class Certification and cross Motions for Summary Judgment, together with all members of the class certified in its ruling. This Court in its ruling of January 14, 1983, has held that notices must be sent by the state defendant to all persons whose tax refunds have been intercepted or whom the defendant intends to certify to the IRS as delinquent in their child-support payments and who may therefore be subject to the intercept program. The notice shall inform such persons of their possible defenses and their right to an administrative hearing. The Court in its ruling of January 14, 1983, set forth the necessary requirements and procedures for the administrative hearing, including the right to judicial review, if the due-process rights of persons subject to certification as delinquent in child-support payments are to be protected. The Court herewith sets forth the requirements of the notices and the administrative hearing.

### I. NOTICE

(a) The notice sent to persons who may be certified to the IRS as delinquent in child-support payments for interception of tax

refunds for the taxable year 1983 and subsequent years shall contain the information as to the right to an administrative hearing and subsequent court review as outlined in the ruling of January 14, 1983. The notice shall contain a list of possible defenses that may be raised at the administrative hearing, including, but not limited to, the following:

1. Wrong person. The affected taxpayer has been incorrectly identified as a delinquent child-support obligor.

2. Failure to assign support rights. The person who is owed child support did not assign the obligation to the State.

3. Bankruptcy. The taxpayer has had the child-support obligation discharged in bankruptcy. The notice shall include a statement of necessary documentation to establish this defense.

4. No court order. No support order is in effect.

5. Wrong amount certified. The taxpayer should be permitted to present documentary evidence to establish that an incorrect arrearage is claimed by the State.

The notice shall also inform the recipients of the notice of the right of a non-obligated spouse to receive his or her portion of the tax refund from the Internal Revenue Service in the case of a joint return.[2]

(b) Persons who were certified to the IRS as delinquent in child-support payments assigned to the State in 1982 have received

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[2]In his proposed order the state defendant included a provision that the notice also contain information regarding court procedures to obtain a modification of existing support orders. The Court commends such notice but does not feel it appropriate to include the same as a requirement in its order.

two notices from the State which the Court has recognized in its ruling of January 14, 1983, as a good-faith effort of the State defendant to meet due process requirements. However, pursuant to this Court order, a notice shall be sent to such persons as were identified by the IRS as individuals potentially eligible for a tax refund informing them of their right to an administrative hearing and of their right to raise defenses, as set forth in subparagraph (a).

(c) The State defendant shall send a notice to all persons whose 1981 tax refunds were intercepted, informing them of their right to an administrative hearing for refunds and of their right to raise defenses as set forth in subparagraph (a).

(d) The IRS shall individually notify each non-obligated spouse filing jointly with a person whose tax refund will be intercepted in 1983 and thereafter under the program, informing such spouses of his or her right to apply to the IRS for his or her portion of the tax refund. Any person claiming an entitlement to a refund because he or she is a non-obligated spouse who had a refund intercepted from a joint return may so apply to the IRS and a refund shall issue upon proof of entitlement thereto.

II. HEARING PROCEDURES

The state administrative hearing shall be before an official with authority to provide the requested relief. Such review need not consist of a full adjudicative hearing but shall permit the complainant to appear personally and present documentary evidence and examine the evidence that forms the basis of the certification. The final administrative decision shall be judicially reviewable pursuant to Conn. Gen. Stat. §4-183,[3] although application for such review shall not necessarily preclude the State from proceeding with the certification and interception of the refund.

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[3]The state defendant has recommended judicial review has provided by Connecticut's Administrative Procedures Act.

## III. TIMING OF NOTICES AND HEARING PROVISIONS

1. The notices set forth above shall be mailed by the State defendant to all persons who have had their tax refunds intercepted in the years 1981-1982 or whose names have been certified to the Internal Revenue Service for the tax year 1982 no later than 30 days from the date of this order.

2. Such notices shall advise such persons that they have 30 days from the date of mailing to request a hearing. Furthermore, after the Department of Human Resources receives such a request, the matter shall be promptly scheduled for a hearing. Notice of the scheduled hearing shall be mailed to the aggrieved person at least fifteen days prior to the scheduled hearing.

3. The decision of the hearing officer shall be in writing and shall be rendered within ninety days of the close of evidence and filing of all papers in the hearing.

4. With respect to implementation of the intercept program in future years, such time limits as set forth above may be changed if necessary, as long as the changes comply with due process, but in no case shall any individual be certified to the IRS without first having been provided an opportunity for the administrative hearing set forth above.

5. The defendant, Ronald H. Manning, Commissioner of Human Resources, or his successor, shall take such action as may be necessary to implement the procedures for administrative hearings as set forth herein and cause the notices described herein to be mailed to all members of the class certified in the Court's ruling of January 14, 1983.

## IV. OBLIGATIONS OF THE IRS

The IRS shall, upon appropriate application, refund the non-obligated spouse's portion of the intercepted income tax refund in the case of a joint return as above provided.

The IRS shall, if this Court's ruling on the earned income credit is upheld on appeal, refund the earned income credit to the eligible individuals.

## V. STAY

As above noted, the Court's ruling that the earned income credit is not subject to the intercept program will have a substantial impact upon the effect and operation of the IRS child-support intercept program. Therefore, the federal defendants' request for a stay is granted until the expiration of the period provided for appeal or until final judgment on appeal, whichever is later.

SO ORDERED

ELLEN BREE BURNS
*United States District Judge*

Dated at New Haven, Connecticut, this 22nd day of April, 1983.

## APPENDIX D

ELINOR NELSON, *et al.*

*v.*

DONALD REGAN, *et al.*

Civ. No. N82-173.

UNITED STATES DISTRICT COURT,
D. CONNECTICUT

Jan. 14, 1983.

Michael Sheehan, N.H. Legal Assistance, New Haven, Conn., Jo Anne Miner, Danielson, Conn., for plaintiffs.

Joseph X. Dumond, Asst. Atty. Gen., Hartford, Conn., for defendant Manning.

Linda Lager, New Haven, Conn., John P. McAllister, Trial Atty., Tax Div., Dept. of Justice, Washington, D.C., for defendant Regan.

RULING ON FEDERAL DEFENDANTS' MOTION TO DISMISS, PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND CROSS MOTIONS FOR SUMMARY JUDGMENT

ELLEN B. BURNS, *District Judge.*

This case involves the federal-state "intercept" program authorized by the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, §§2331, 2332, 95 Stat. 860-63, under which federal income tax refunds may be transferred to the state to the extent of the taxpayer's past-due support obligations. The implementation of this program in Connecticut is described in this Court's June 4, 1982, ruling on plaintiffs' motion for a preliminary injunction.

Plaintiffs filed this suit as a class action, seeking a declaratory judgment that the statutes and regulations as implemented are unconstitutional and injunctive relief in the form of notification to the putative class members whose tax refunds might be intercepted and a hearing before the refunds may be assigned to the Connecticut Department of Human Resources (DHR).

This Court denied plaintiffs' motion for a preliminary injunction. It also denied the state defendant's motion to dismiss. Still before the court are the federal defendants' motion to dismiss, plaintiffs' motion for summary judgment, plaintiffs' motion for class certification and state and federal defendants' motions for summary judgment.[1]

A. *Federal Defendants' Motion to Dismiss*

Defendants Donald Regan, Secretary of the United States Department of the Treasury, and Richard Schweiker, Secretary of the United States Department of Health and Human Services (HHS), claim that this action is barred by §6305(b) of the Internal Revenue Code of 1954 and by the Anti-Injunction Act, §7421(a) of the Internal Revenue Code of 1954. For the reasons stated in this court's ruling on Defendant Manning's motion to dismiss, this argument is rejected.

Defendants also argue that the Declaratory Judgment Act, 28 U.S.C. §2201, prohibits declaratory relief with respect to any action challenging federal taxes and, therefore, with respect to this action challenging the interception of tax refunds. The Declaratory Judgment Act authorizes declaratory relief ". . . except with respect to Federal taxes . . .".

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[1]Plaintiff's have also filed a motion to amend judgment following the denial of their motion for preliminary injunction. This motion is denied.

It is not necessary for this court to decide whether the breadth of the Declaratory Judgment Act's exception for taxes is co-extensive with the effect of the Anti-Injunction Act. *"Americans United" Inc. v. Walters*, 477 F.2d 1169, 1176 (D.C.Cir.1973), *rev'd on other grounds*, 416 U.S. 752 (1974). Because the Declaratory Judgment Act's prohibition refers to taxes and, like that of the Anti-Injunction Act, is designed to protect the "Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference," *Bob Jones University v. Simon*, 416 U.S. 725, 736 (1974), it is inapplicable to questions dealing with the disposition of a tax refund. As this court noted in its ruling on Defendant Manning's motion to dismiss, the federal-state intercept program takes effect only after the assessment and collection of federal income taxes. The federal government at that point has no interest in the refunds. No substantial governmental purpose related to taxes would be served by prohibiting either injunctive or declaratory relief in this case. Thus, this action is not barred by the Declaratory Judgment Act.

The federal defendants' claim that the doctrine of sovereign immunity bars the action raises more troublesome issues. In general, the United States, as sovereign, is immune from suit absent its consent. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). There is no question that Defendants Regan and Schweiker are sued in their official capacities, not in their individual capacities, and that this is a suit directed against the United States. *See Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). The relief requested would require the Secretary of HHS to refrain from certifying the names of people subject to the intercept program to the Internal Revenue Service (IRS) and the Secretary of Treasury to refrain from transferring the tax overpayments to the DHR until the putative class members have been notified of the intercept program and been given an opportunity to challenge any offset of their tax overpayments at a hearing. The effect of the judgment would be "to restrain the Government from acting, or to compel it to act," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949) and, thus, is an action against the United States.

Several exceptions to the doctrine of sovereign immunity have been recognized in suits against the United States. In particular, the doctrine does not bar a suit when "the complaint alleges that agents of the Government have exceeded their constitutional authority while purporting to act in the name of the sovereign." *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir.1970), *cert. denied sub nom. Orlando v. Laird*, 404 U.S. 869 (1971); *see Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949); *Smith v. Lehman*, 689 F.2d 342 at 345 (2d Cir.1982). Plaintiffs here allege that their tax refunds have been withheld in violation of their Fourteenth Amendment due process rights. Thus, this exception to the doctrine of sovereign immunity applies. Sovereign immunity cannot serve as a defense in this case.[2]

Finally, the federal defendants claim that complete and effective judgment for the plaintiffs would impose no obligations on the federal defendants. If this allegation is correct, the complaint must

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[2]The doctrine of sovereign immunity will not bar this suit even if there were no claimed constitutional violation. The doctrine applies in suits seeking declaratory and injunctive relief "if the relief requested cannot be granted by merely ordering the cessation of conduct complained of but will require affirmative action by the sovereign . . . ," *Larson v. Domestic & Foreign Commerce Corp., supra* 337 U.S. at 689 n.11, 69 S.Ct. at 1462 n.11, but not if the relief requested does not interfere with the necessary functioning of the government. In cases where the plaintiff made "only a comparatively mild request," as in *United States v. Briggs*, 514 F.2d. 794, 808 (5th Cir. 1975), or sought "modest" relief, as in *Leopold v. Civil Serv. Comm'n.*, 450 F. Supp. 154, 157-58 (E.D.N.Y. 1978) courts have not recognized a defense of sovereign immunity.

Here, the federal defendants are already participating in the refund offset program. If the State defendant provides the notification and hearings requested by the plaintiffs, the federal defendants need only slightly modify their departmental procedures. They would have to provide information on the breakdown of the tax overpayments between refunds of taxes paid and earned income credits, *see infra* section D, as well as between refunds due the obligated taxpayer and that taxpayer's spouse. None of these obligations, if imposed on the federal defendants, would create a substantial financial or administrative burden.

be dismissed with respect to the federal defendants for failure to state a claim upon which relief may be granted, under Fed.R.Civ.P. 12 (b)(6).

A complete and effective remedy for the plaintiffs, should they succeed on the merits of their claims, cannot be guaranteed without the presence of the federal defendants. The IRS must provide information on the amount of the tax refunds attributable to the non-delinquent spouse's income and to earned income credits. Only that part of the refund attributable to the obligated taxpayer's refund of taxes paid is covered by the federal-state intercept program. *See infra,* section D. Section 2331 also provides that the Secretary of the Treasury, with the approval of the Secretary of Health and Human Services, shall issue regulations governing the cooperating state agency's implementation of the program. Both federal defendants are necessarily implicated in the operation of the intercept program. For the foregoing reasons, the federal defendants' motion to dismiss is denied.

B. *The State's Eleventh Amendment Claim of Immunity*

If the federal defendants do not refrain from transferring the tax overpayments to the State until complainants have been granted their full due process rights, the State asserts that the Eleventh Amendment will serve as a bar to plaintiffs' retroactive recovery. *Edelman v. Jordan,* 415 U.S. 651, 657 (1974), explained that the Eleventh Amendment limited federal judicial remedial power to prospective injunctive relief and prohibited retroactive awards from a state's treasury. Plaintiffs, however, do not request that this court order the State of Connecticut to return funds received through the intercept program. Rather, they request declaratory and injunctive relief. The Eleventh Amendment, therefore, is not an issue in this case.

C. *Plaintiffs' Motion for Class Certification*

Plaintiffs have moved that a class be certified, consisting of all persons whose income tax refunds have been or will be withheld

and paid over to the State of Connecticut pursuant to §2331(a) of the Omnibus Reconciliation Act of 1981.[3]

There is no compelling reason to designate a class, since the equitable relief granted would benefit all persons similarly situated. *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 354 F.Supp. 778, 783 (D.Conn.1973). Nonetheless, this is a case where the requirements of Fed.R.Civ.P. 23(a) and (b) are met, and a class may be certified.

Plaintiffs seek procedural protections for all people whose tax refunds have been or will be intercepted. They are not asking for individual reimbursement based upon particularized defenses. Thus, there can be no question that numerous people are involved;[4] that the legal questions relating to procedural due process and the factual questions relating to the implementation of the program in Connecticut are common; that the claims of the named plaintiffs are typical of all class members insofar as procedural claims are involved; and that plaintiffs have actively and competently represented class members in their pursuit of procedural protections.

An action, such as this, seeking declaratory and injunctive relief against government officials is the archetype of one where class action designation is straightforward, but largely a formality. *See Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir.1973). Rule 23(b)(2) authorizes maintenance of a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class." That is clearly the case here.

This case may be maintained as a class action, extending to those who have had or will have their tax refunds intercepted and paid over to the State of Connecticut.

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[3]Plaintiffs' motion and brief do not explicitly limit the proposed class to those whose refunds may be turned over to Connecticut. The argument before the court, however, has dealt only with the operation of the program in Connecticut.

[4]DHR certified over 20,000 names to the IRS.

D. *Cross Motions for Summary Judgment*

The plaintiffs and each of the defendants have filed motions for summary judgment. Plaintiffs challenge the adequacy of the procedures provided in the statutory and regulatory scheme created by §2331 of the Omnibus Budget Reconciliation Act of 1981, in 42 U.S.C. §664, 26 U.S.C. §6402, 47 Fed.Reg. 5712 (1982), and 47 Fed.Reg. 7425 (1982). Defendants claim that the notices sent by the State and by the IRS provide adequate procedural protections in this case involving a post-judgment diversion of assets. The validity of the individual claims of the plaintiffs or putative class members is not at issue.

There is no real dispute about the facts material to the claims, except perhaps for the accuracy of the State's list certifying to the IRS names of people who are delinquent in their support payments. As discussed below in note 10, this dispute does not affect the court's decision.

There is no need to review in detail the operation of the tax intercept program. In brief, the state agency in charge of implementing the intercept program, the Child Support Division (CSD) of the DHR, certified the names of individuals delinquent in their support obligations to the United States Treasury. Only later were the individuals notified that their tax refunds may be intercepted to offset delinquent support obligations assigned to the State and that questions about the individuals' support obligations could be addressed to a Family Relations Officer or the CSD. They were not told the claimed amount of their obligations or the fact that their names had already been certified to the IRS. Nor did the notice indicate the available defenses to the interception of tax refunds or the possibility that the refund of a non-obligated spouse in the case of a joint tax return might be intercepted.

The notice did not provide information about a procedure to challenge a refund offset. The two agencies identified in the notice

appear to be available to answer questions, but not to provide a regular procedure in which to remedy errors.[5] Indeed, Family Relations Officers have no authority to delete names from the list certified to the IRS. CSD, by contrast, may correct the list but has played a limited role in handling complaints.

A second notice was sent by the IRS to the taxpayer and the taxpayer's spouse, in the case of a joint return, after the refund had been intercepted. The notice advised the taxpayer of the amount of the overpayment, the amount intercepted and the fact that the intercepted overpayment had been paid to the State. The notice also advised the taxpayer that any questions about the obligation should be addressed to the CSD.

No other notices were sent before the filing of this suit. No provisions were made for regular procedures in which to challenge the State's claim to a refund.[6]

There is no doubt that the interception of their tax refunds deprived plaintiffs of a protected property right and that the due process guarantees of the Fifth and Fourteenth Amendments are implicated. The issue before the court, thus, is whether the two notices and the availability of personnel from the Family Relations Office and the CSD to answer questions satisfy the taxpayers' due

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[5]The notice, dated February, 1982, provides:

"If you question whether you owe past due child or spouse support payments, and if you are uncertain of the amount of such payments, please contact your Family Relations Officer or the Child Support Unit located where your dependent children live."

[6]As applicable to the intercept of refunds due on 1982 tax payments the DHR sent two modified notices, dated September and October, 1982. These notices are not an issue in this case, but indicate the State's good faith attempt to comply with the requirements of due process. The second notice states that complainants may obtain a pre-interception review by a Family Relations Officer, followed by the right to a court hearing. It also describes two defenses a complainant might raise.

process rights to notice and an opportunity to contest the assignment of their refunds.

The requirements of due process are not inflexible and must take into account the circumstances surrounding the particular governmental action complained of. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In determining what process is due, the court will consider separately the requirements of notice and of a procedure for resolving disputes.

The Supreme Court announced in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), that a "fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." In a case involving the termination of electric utility service, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 15 (1978), the Supreme Court interpreted this requirement to include notice of the availability of a procedure for protesting the contested government action. Because many of the utility company's customers may be unsophisticated, the court noted the importance of a clear and specific notice. *See id.* at 15 n. 15, 98 S.Ct. at 1563 n. 15.

Other courts have required notification not only of the procedures but of the defenses available to a judgment debtor. *See Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir.1980); *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178, 1187 (S.D.N.Y.1982). Both of these cases involve judgment debtors who contested execution of the judgments by judgment creditors. Even though the debtors had been afforded an opportunity to challenge the underlying debt, they were given inadequate notice of the enforcement of the judgment against particular property. The two courts held that due process under the circumstances requires notice both of the exemptions to which the debtors may be entitled and of the procedures for asserting those exemptions. The procedural protections available before the original judgment on the debts was entered were held to be an insuffi-

cient substitute for the constitutionally required procedures at the time of execution upon that judgment when the debtor may assert new defenses.

Like the judgment debtors in *Finberg* and *Deary*, plaintiffs claim they were not afforded adequate notice. State court proceedings which determine support obligations certainly do not provide notice of the statutory authority created by §2331 of the Omnibus Budget Reconciliation Act. If those proceedings put anyone on notice as to future actions to enforce the obligations, it is the person with the obligation, not a non-obligated spouse or a person with no assigned obligation whatsoever, as several of the plaintiffs and putative class members here claim to be.[7] Knowledge of the state proceedings cannot provide the kind of specific and clear notice, even to those with obligations, that the Supreme Court found was necessary in *Memphis Light*, involving similarly unsophisticated complainants.

Both the pre-intercept notice sent by the DHR and the post-intercept notice sent by the IRS fail to meet the due process requirements for notice. Neither mentions the possible defenses an individual might have to the interception of tax refunds or the availability of regular procedures in which to challenge the offset. Some people, in particular non-obligated spouses filing joint tax returns, never received individual notice. Others, especially when they are relatively uneducated and uninformed about their legal rights, may feel quite helpless when told that their refunds will be intercepted. A clear and detailed predeprivation notification, specifying the possible defenses and the procedures for asserting those defenses, is necessary to afford due process protection to these individuals.[8]

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[7]For example, plaintiff Elinor Nelson claims that she owed no support, inasmuch as the State's action against her for support has been dismissed in June, 1981; Dorothy Whitfield filed a joint return with her husband, who alone owed the past-due support; proposed intervenor George Huntley claims that his child support obligations were never assigned to the State.

[8]The State has already indicated its willingness to send more detailed notices. See supra note 6.

Under the second branch of the due process requirements, complainants must have available an opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In general, a predeprivation notice and opportunity to be heard is required, *see Parratt v. Taylor*, 451 U.S. 527, 538 (1981), but in certain circumstances, postdeprivation remedies may suffice. Where a public health danger exists, as in *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (unwholesome food), and *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (dangerous drugs); where there is an economic emergency during wartime, as in *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control orders); where predeprivation administrative proceedings are substantially fair and reliable, as in *Mathews v. Eldridge, supra* (social security termination); and where predeprivation process is impracticable, as in *Parratt v. Taylor, supra* (negligent actions by state prison officials), due process requirements may be satisfied with a postdeprivation hearing.

The Mathews court indicated three factors which should be considered in balancing competing interests to determine the appropriate time and type of procedural protection:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, supra at 335.

The private interest here is obvious. Tax refunds, especially for the low and moderate income individuals affected by these statutory

provisions, may make a noticeable difference in the individuals' living standards. Even if the burden of an unjust offset is not as great as that of the loss of welfare benefits for those on the very margin of subsistence, as in *Goldberg v. Kelly*, 397 U.S. 254 (1970), it is significant. A temporary deprivation may create a substantial burden.

The State government's interest in receiving its share of the tax refund is, also, not insignificant. The State provides assistance to families with dependent children and, before granting eligibility for assistance, requires recipients to assign their accrued support rights to the State. The State has a clear financial interest in obtaining payment in accordance with the assigned support rights as soon as possible. An opportunity to challenge the interception of a tax refund, however, will not permanently deprive the State of its legitimate assignment rights. Unlike the case of *Mathews v. Eldridge, supra,* where a predeprivation hearing would allow the social security recipient to continue to receive and spend benefits, even if termination is ultimately upheld, a predeprivation hearing here would leave the disputed funds under the control of the IRS. There is no danger that the property will be wasted or concealed.

No doubt, a requirement that the government provide hearings, whether before or after the deprivation, would impose a fiscal and administrative burden beyond that imposed on the DHR and the Family Relations Officers at the time this suit was filed. An announced administrative procedure with judicial review, where individuals may challenge the refund offset and present defenses, however, need not impose a great burden. The administrative procedure may take the form of an opportunity to submit documents which support the complainant's claim along with an opportunity to discuss the matter with an official. The hearing officer should submit a short statement of the reasons for the decision reached. Judicial review may be confined to the record.

A predeprivation proceeding is not impracticable, as it would have been in the case of negligent official conduct in *Parratt, supra.*

Nor should such a hearing impose a great administrative burden on the government. The State has already shown good faith efforts to comply with the requirements of due process by sending modified notices. Two modified notices are dated September and October, 1982, allowing ample time before the fifteenth of December, the last day on which the certified lists submitted for administrative review of the certification of names to the IRS may be updated, as provided in the new notices themselves.

Pretermination administrative review does not impose a greater financial burden on the State than the DHR has already willingly undertaken in response to the complaints arising out of the tax refund intercept program. The State currently offers an administrative review of the proposed offset, and claims judicial proceedings are available thereafter.[9] Modification of the notices and of the proceedings to comply with this Court's order imposes no additional financial burden.

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[9]The nature of and legal basis for judicial review of the DHR's decision is not clearly stated in the notice sent by the State in October, 1982. In particular, the notice does not indicate whether the review is available under Conn.Gen.Stat. §4-166 *et. seq.* the Uniform Administrative Procedure Act, after a hearing provided by a Family Relations Officer satisfying the procedural requirements for contested cases under the statute. If the administrative hearing does not satisfy the statute's requirements, and the due process clause of the Fourteenth Amendment does not require all the safeguards mandated by Conn.Gen.Stat. §4-166 *et. seq.*, *Adamchek v. Bd. of Educ. of Stamford*, 174 Conn. 366, 387 A.2d 556 (1978), then judicial review under the statute is unavailable.

If, instead, the October, 1982, notice's reference to a court hearing is to a judicial review of court ordered support, due process protections are not afforded complainants without support obligations or with other defenses to the intercept program.

The court recognizes that any retroactive modification of support can only be effected by action of the state court and that access to the court to seek this kind of relief has always been available. The notice, hearing and judicial relief which are contemplated by this opinion are those which taxpayers who wish to challenge the existence of a valid support order against them or the amount of any claimed arrearage must have available.

The Family Relations Officer or other official who handles the administrative review must have the authority to delete names from the list certified to the IRS. Here, as in *Memphis Light, supra* at 18, an "opportunity for a meeting with a responsible employee empowered to resolve the dispute could be afforded well in advance of the scheduled date of termination."[10]

In addition to their due process arguments, plaintiffs raise a substantive defense to the interception of certain tax refunds. They argue that the interception of refunds from the IRS applies only to refunds of taxes paid, but not to "refunds" of Earned Income Credits (EIC).

[9] The statutory language is not clear. Therefore, some analysis of the relevant three provisions is necessary. 42 U.S.C. §664 of the Social Security Act defines the term "past-due support" and authorizes the Secretary of Treasury to withhold past-due support from "refunds of Federal taxes paid."[11] 26 U.S.C. §6402 of the Internal

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[10]Because of the small cost to the government of providing additional procedural safeguards, it is unnecessary to make a detailed inquiry into the risk of erroneous deprivation and the probable value of additional safeguards. Named plaintiffs allege that their refunds were incorrectly intercepted when they had defenses which they could have presented to an administrative official. There appears to be some benefit from the proposed safeguards.

[11]42 U.S.C. §664 provides.

(a) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to §602(a)(26) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with §657(b)(3) of this title.

(b) The Secretary of the Treasury shall issue regulations, approved by

Revenue Code authorizes the reduction by the amount of past-due support of "any overpayment to be refunded to the person making the overpayment.[12] 26 U.S.C. §6401 of the Internal Revenue Code

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the Secretary of Health and Human Services, prescribing the time or times at which States must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall specify the minimum amount of past-due support to which the offset procedure established by subsection (a) of this section may be applied, and the fee that a State must pay to reimburse the Secretary of the Treasury for the full cost of applying the offset procedure, and provide that the Secretary of the Treasury will advise the Secretary of Health and Human Services, not less frequently than annually, of the States which have furnished notices of past-due support under sbusection (a) of this section, the number of cases in each State with respect to which such notices have been furnished, the amount of support sought to be collected under this subsection by each State, and the amount of such collections actually made in the case of each State.

(c) As used in this part the term "past-due support" means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for supoort and maintenance of a child, or of a child and the parent with whom the child is living.

[12]26 U.S.C. §6402 provides:

(a) In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsection (c), refund any balance to such person.

(b) The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer of the Secretary to be an overpayment of the income tax for a preceding taxable year.

(c) The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in §464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with §464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support

defines overpayment to include the excess of an earned income credit over tax liability.[13]

The ambiguity in the statutory provisions involves the use of the word "overpayment" which is broadly defined in 26 U.S.C. §6401, but is limited in 26 U.S.C. §6402 by inclusion of the phrase "overpayment to be refunded to the person making the overpayment." Significantly, a less inclusive phrase is also used in 42 U.S.C. §664. The two latter provisions, but not the former, are part of §2331 of the Omnibus Budget Reconciliation Act of 1981. Section 6401, by contrast, is a general provision in the chapter on abatements, credits and refunds, of the Internal Revenue Code, governing the tax refund process.

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has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

[13]26 U.S.C §6401 provides:

(a) The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b) If the amount allowable as credits under §§31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit) exceeds the tax imposed by subtile A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under §§31, 39, and 43), the amount of such excess shall be considered an overpayment. For purposes of the preceding sentence, any credit allowed under paragraph (1) of §32 (relating to withholding of tax on nonresident aliens and on foreign corporations) to a non-resident alien individual for a taxable year with respect to which an election under §6013(g) or (h) is in effect shall be treated as an amount allowable as a credit under §31.

(c) An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

This narrow reading of overpayment, such that the intercept program does not apply to the EIC, is supported by the legislative purpose behind the EIC. *See* S.Rep. No. 94-36, 94th Cong., 1st Sess. 11 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 54, 64. The EIC was designed to "provide relief to families who currently pay little or no income tax . . . . [T]he new credit, in effect, provides an added bonus or incentive for low-income people to work . . . ." *Id.* at 64. If the credit were intercepted by the IRS, those purposes would be undercut. *Cf. In re Searles*, 445 F.Supp. 749, 752 (D.Conn.1978) (EIC not considered property of the bankrupt within meaning of Bankruptcy Act, because of Congressional purpose to assist needy families).

The narrow interpretation of the statutory language provided by the plaintiffs must be upheld. The notice sent to the plaintiffs, therefore, must include notice of this defense to the intercept program.

Plaintiffs' request for declaratory relief is granted. The operation of the tax refund intercept program violated their due process rights protected by the Fifth and Fourteenth Amendments.

Defendants must provide notice to all those whose tax refunds might be intercepted, specifying the possible defenses they might have and the availability of regular procedures in which to challenge the offset. They must also provide a predeprivation administrative review before an official with the authority to remove names from the list certified to the IRS. That review need not consist of a full adjudicative hearing, but must permit the complainant to appear personally and to present documentary evidence. The final administrative decision must be judicially reviewable, although not necessarily before the tax refunds are intercepted. The parties shall submit for the Court's review, no later than March 1, 1983, proposals for notice and procedures in conformity with this opinion. The

Court retains jurisdiction for the purpose of determining what, if any, injunctive relief may be appropriate and for the assessment of costs and attorneys' fees.

SO ORDERED.

## APPENDIX E

MARIE D. SORENSON, Plaintiff,

*v.*

The SECRETARY OF the TREASURY OF the UNITED STATES, and The United States of America. Defendants.

Civ. A. No. C82-441C.

United States District Court,
W.D. Washington.

Dec. 28, 1982.

Peter Greenfield, Evergreen Legal Services, Seattle, Wash., J. Bruce Smith, Evergreen Legal Services, Bellingham, Wash., for plaintiff.

Gene S. Anderson, U.S. Atty., Charles C. Pinnell, Asst. U.S. Atty., Seattle, Wash., Scott A. Milburn, Trial Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for defendants.

### ORDER OF PENDING MOTIONS

COUGHENOUR, District Judge.

Plaintiff challenges portions of the Omnibus Budget Reconciliation Act of 1981 which provides a new mechanism for the collection of delinquent child support payments. Under the Act, tax refunds owed to parents having delinquent child support obligations are instead transferred to the states to reimburse the states for expenditures they made to support the affected children under the Aid to Families with Dependent Children ("AFDC") program. Plaintiff challenges these provisions to the extent they authorize the transfer of tax refunds created by her earnings.

FACTS

Plaintiff if a married woman who lives in the State of Washington. Her husband is indebted to the State of Washington for his failure to make required child support payments to the children of his prior marriage. In February of 1982, plaintiff and her husband filed a joint 1981 Federal income tax return. All the income reported was from plaintiff's wages and unemployment benefits. Plaintiff and her husband were to receive a tax refund of $1,408, consisting of excess withheld wages and an earned income credit.

Plaintiff did not, however, receive her expected refund. The Internal Revenue Service ("I.R.S.") withheld payment of the refund so that the refund could be offset against the amount owed Washington State because of her husband's nonpayment of child support. After unsuccessfully trying to obtain her refund from the local office of the I.R.S. and the Washington State Department of Social and Health Services, Office of Support Enforcement ("DSHS"), plaintiff instituted the present action on April 19, 1982. On April 22, the I.R.S. confirmed the information plaintiff received from the local office that all or part of her refund was being withheld to satisfy a past-due support obligation. On June 28, the I.R.S. sent plaintiff "legal notice" that her claim for refund was partially disallowed. Presumably pursuant to Washington community property law, all of the overpayment of tax resulting from the income of plaintiff's husband and one-half of the overpayment resulting from plaintiff's income was to be retained and transferred to the State of Washington for the payment of plaintiff's husband's support obligation. Defendants later clarified their position, and only claimed one-half of the total community property overpayment.

ISSUES PRESENTED

Plaintiff objects to the retention of half of the tax refund resulting from her earnings and unemployment compensation. She has filed a motion for class certification and for summary judgment. Defend-

ants have filed a motion to dismiss and a motion for summary judgment. The central issues raised by these motions are: (1) whether plaintiff's suit should be characterized as one involving the collection or assessment of taxes and therefore subject to the legal impediments to suit applicable to tax actions; (2) whether plaintiff's husband has a property interest in his wife's earnings for the purposes of collection of his separate debt of child support; and (3) whether the procedures employed satisfy due process. These inquiries require an examination of the statutory scheme and the relationship between State property law and the collection of Federal taxes.

## THE STATUTORY SCHEME

The collection of past-due support payments is a matter of private, State and Federal concern. While Congress believed that the basic responsibility for the collection of child support rested with the States, Congress did envision a more active Federal role. See S.Rep. No. 93-156, 93rd Cong.,2nd Sess., reprinted in 1974 U.S. Code Cong. & Ad.News 8133, 8150 (hereinafter referred to as "Senate Report"). Two schemes have been enacted for the Federal collection of child support.

Under the first and older system, the States are authorized to use the Federal income tax collection mechanism itself for collecting support payments. Senate Report at 8153. Upon request of a State with an approved State plan, the Secretary of the Department of Health, Education and Welfare is authorized to certify the amount of any child support obligation assigned to that State to the Secretary of the Treasury. 42 U.S.C. §652(b). Parents, as a condition of eligibility for welfare, are required to assign their rights to support payments to the State and to cooperate with the State in the securing of support payments from the obligated parent. Senate Report at 8152. The support obligation becomes a debt owed by the obligated parent to the State. *Id.* at 8153. Upon receiving certification from the Secretary of Health, Education and Welfare of the amount owed to the State by the obligated parent, the Secretary of the Treasury is

required to assess and collect that amount "in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax . . . ." 26 U.S.C. §6305(a). This collection mechanism was intended to be available only in cases in which the State could establish to the satisfaction of H.E.W. that it had made diligent efforts to collect the payments through the other processes but without success. Senate Report at 8153. This method is hereafter referred to as the "assessment" collection method.

The second Federal method of collection is the one presently under challenge. Upon receiving notice from a State child support agency that an individual owes past-due support which has been assigned to the State as a condition of AFDC eligibility, the Secretary of the Treasury is required to determine whether any amounts as refunds of Federal taxes paid are payable to that individual. If any refunds are owed, he is authorized to withhold from such refunds an amount equal to the past-due support. That money is to be paid directly to the State agency, together with notice of the taxpayer's current address. *See* Omnibus Budget Reconciliation Act of 1981, Pub.L. 97-35, 95 Stat. 357, S.Rep. No. 97-139, 97th Cong., 1st Sess., reprinted in 1981 U.S.Code Cong. & Ad.News 396, 1347 (hereinafter referred to as "Committee Report"). *See also* 42 U.S.C. §664 and 26 U.S.C. §6402. Thus, unlike the prior system, these provisions authorize the interception and transfer of funds already in the possession of the Government. This method is hereafter referred to as the "transfer" collection method.

## THE CHARACTERIZATION QUESTION

The characterization of the plaintiff's claim is hotly contested by the parties. Defendants contend that this is a tax refund suit while plaintiff claims this is merely a collection case. The determination of the nature of the plaintiff's claim has a direct impact on the issues of subject matter jurisdiction, sovereign immunity, injunctive and declaratory relief and the propriety of the maintenance of a class action.

Tax cases in the Federal courts are subject to strict procedural requirements. Suit cannot be begun for the recovery of any tax until six months have expired from the filing of the claim for refund, unless the Secretary of the Treasury disallows the claim within that time. 26 U.S.C. §6532. *See Davis v. Commissioner*, 78-1 U.S.T.C. ¶ 9355 (D.S.C.1978). The six-month requirement may even be applicable if the Secretary subsequently denies the claim after plaintiff had begun suit. *See Anderson v. I.R.S. District Director*, 79-2 U.S.T.C. ¶ 9519 (E.D.Wis.1979). Another result in tax cases is that the United States and its officers have not consented to be sued for tax refund action unless the procedural requirements have been satisfied. *See* 5 U.S.C. §702 (sovereign immunity is not waived if another statute expressly forbids the relief sought). Moreover, except in extremely limited situations, injunctive and declaratory relief are unavailable in the tax context. 26 U.S.C. §7421(a) prohibits the bringing of suit for the purpose of restraining the assessment or collection of any tax. The Anti-Injunction Act has been given wide reading by the courts. *See Bob Jones University v. Simon*, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974); *Zimmer v. Connett*, 640 F.2d 208 (9th Cir.1981). The Declaratory Judgment Act contains a similar exception for suits with respect to Federal taxes. 28 U.S.C. §2201. Finally, the above jurisdictional and procedural limitations, as well as the general nature of tax cases, would make class certification very problematic.

A support obligation is significantly different from a tax obligation. *See* Senate Report at 8153 ("support obligations are not a tax"). Defendants argue, however, that as plaintiff is seeking a return of her tax refund, she is subject to the procedural limitations of a tax refund suit. Moreover, the jurisdictional limitations of 26 U.S.C. §6305(b) are allegedly applicable to plaintiff's claim. 26 U.S.C. §6305(b) attempts to preclude the courts of the United States from retaining jurisdiction to review or restrain the Secretary of the Treasury from assessing or collecting amounts under the "assessment" collection method. Although §6305 makes no reference to the "transfer" collection method under challenge in the present action, defendants rely on language found in the House Conference

Report that indicates the second collection method "amplified" prior law. *See* Committee Report at 604. Finally, the Secretary of the Treasury's own regulation provide that the past-due support under the "transfer" collection method is to be collected by offset "as if it were a liability for tax imposed by the Internal Revenue Code." Temp.Reg. §304.6402-1(a)(1).

The Court must reject the defendants' contentions. First, there is nothing to suggest that the jurisdictional limitations of §6305(b) are applicable to §6402. The Treasury Regulations make clear that "[c]ollection by offset under §6402(c) of this section is a collection procedure separate from the collection procedures provided by §6305." A similar argument was rejected by the district court in *Nelson v. Regan*, No. N 82-173 (D.Conn., June 15, 1982) (order denying motion to dismiss). Second, the Court cannot agree with defendants that Congress intended that the assessment and collection of past-due support obligations be subject to the procedural limitations of a tax refund suit. Plaintiff is not seeking a tax refund in anything but a purely technical sense. The Internal Revenue Service has calculated the refund owing and that amount is not disputed. Unlike the "assessment" collection method, the Secretary of the Treasury under the "transfer" collection method does no more than retain and then pass on funds to the appropriate State agency. The Secretary does not determine the amount of past-due support owing nor collect any additional funds to satisfy the obligation. In other words, this is not a case where suit would interfere with the assessment and collection activities of the I.R.S. since those activities have already been completed. In fact, the Secretary of the Treasury refers individuals with questions about the transfer to the local State agency. The Court must conclude that the procedural and jurisdictional limitations of tax refund actions are inapplicable to plaintiff's suit. If Congress wanted these limitations to be applicable to the "transfer" collection method, they would have more clearly demonstrated their intent. *See* 26 U.S.C. §6305.

The defendants' motion to dismiss is therefore DENIED. The Court finds that this is not a tax refund suit, that the Anti-Injunction

Act and the similar limitations in the Declaratory Judgment Act are inapplicable to the present action, that sovereign immunity is waived under 5 U.S.C. §702, and that subject matter jurisdiction is found in 28 U.S.C. §1331(a).

The Court also finds that certification of plaintiff's proposed class is appropriate. The class consists of all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. §6402 or 42 U.S.C. §664. The requirements of Fed.R.Civ.P. 23(a) have been met. There are thousands of potential class members, there are common questions of law and fact, the claims of plaintiff are typical of the class, and plaintiff and her counsel will fairly and adequately protect the interests of the class. Moreover, as plaintiff is not seeking anything but injunctive and declaratory relief and as defendants have employed their collection method uniformly throughout the class, final class-wide injunctive or declaratory relief is appropriate. Therefore, plaintiff's proposed class is certified pursuant to Fed.R.Civ.P. 23(b)(2).

Having dealt with defendants' procedural objections, the Court must reach the merits of plaintiff's suit.

EARNED INCOME CREDITS

Plaintiff's first claim concerns the language of the applicable statutes. 42 U.S.C. §664 authorizes the Secretary of the Treasury to withhold "refunds of Federal taxes paid" and transfer these funds to the appropriate State agency to satisfy the debtor's support obligation. 26 U.S.C. §6402(c) provides that the amount of any "overpayment to be refunded to the person making the overpayment" shall be reduced by the amount of past-due support. Plaintiff contends

that earned income credits are not refunds of Federal tax and are therefore outside of the scope of the statutes. Allowing the Secretary to reach earned income credits would allegedly frustrate the Congressional purpose of benefitting poor children and giving their parents an incentive to work. Finally, plaintiff contends that the term "overpayment" in §6402(c) should be given its common sense meaning and that since earned income credits can be paid even if no Federal income tax is owed, the credits must have been excluded from the statutes.

Common sense is not, however, a useful guidepost in dealings with the Internal Revenue Code. Words with well-accepted meanings are often adapted by the Code into terms of very specific interpretation. "Overpayment" is a term of art. 26 U.S.C. §6401(b) provides, in part, that if there are amounts allowable as credits under the earned income credit provisions in excess of Federal income taxes paid, then "the amount of such excess shall be considered an overpayment." It is perfectly consistent that Congress would consider the payment of past-due child support more important than the protection of an earned income credit. The Court finds that earned income credits are within the purview of the statutes and are subject to retention and transfer.

## VAN DYKE AND THE WASHINGTON PROPERTY LAW

The impetus for the present lawsuit was the Washington Supreme Court's holding in *Van Dyke v. Thompson*, 95 Wash.2d 726, 630 P.2d 420 (1981). Plaintiff's husband in *Van Dyke* owed the State of Washington for past-due child support for children from a prior marriage. He was unemployed and had no assets. Defendant Secretary of the Department of Social and Health Services served notice on plaintiff's employer to withhold and deliver to DSHS 25 percent of plaintiff's wages to satisfy her husband's obligation. Plaintiff filed suit seeking injunctive and declaratory relief. The Washington Supreme Court held that despite the fact that plain-

tiff's earnings were community property, they could not be used to satisfy the husband's separate debt. The court's prior holding in *Fisch v. Marler*, 1 Wash.2d 698, 97 P.2d 147 (1939), that only the earnings of the obligated spouse were subject to garnishment for past child support obligations was reaffirmed. Plaintiff contends that just as DSHS could not reach the non-obligated spouse's earnings in *Van Dyke*, so, too, should the tax refund generated by plaintiff's earnings be protected from transfer by the Internal Revenue Service.

Defendants assert that *Van Dyke* is inapplicable. They argue that *Van Dyke* is limited to the collection of separate debts under State law. They claim the proper analysis is that State law only determines whether the obligated spouse has a property interest in the overpayment created by the earnings of the nonobligated spouse. This determination being made in the affirmative, Federal collection law, not subject to the holding of *Van Dyke*, provides that the husband's half interest in the tax refund is reachable.

The parties do not dispute that the source of property law is Washington law. Under Washington law, however, the nature of the husband's interest in the earnings of the plaintiff is in some dispute. RCW §26.16.030 provides that all property not acquired or owned as prescribed in RCW §§26.16.010 and .020 which is acquired after marriage by either husband or wife or both is community property. Separate property is limited to property owned by one of the spouses at the time of marriage or thereafter acquired by gift, devise or inheritance, and the rents, issues and profits thereof. RCW §§26.16.010 and.020. There is a presumption that all property obtained during marriage is community property. *See Yesler v. Hochstettler*, 4 Wash. 349, 30 P. 398 (1892). Under these statutes, plaintiff's husband would have a property interest in the tax refund since that refund would be community property.

The problem arises with the application of RCW §26.16.200. The statute provides that:

> Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: *Provided*, That the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section neither the husband nor the wife shall be construed to have any interest in the earnings of the other: *Provided Further*, That no separate debt may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties.

The Washington legislature added the two provisos in 1969. Prior to 1969, and except in limited cases, Washington followed the marital bankruptcy rule. Immediately upon a debtor's marriage, a creditor lost the ability to enforce his claim against the new marital community. *Watters v. Doud*, 92 Wash.2d 317, 322, 596 P.2d 280 (1979). The 1969 amendment with the addition of the provisos was meant "to alleviate the harsh effects of the previous law" and give the creditor three years in which to get payment of the debt or reduce the debt to judgment. *Id. See* Note, 45 Wash.L.Rev. 191 (1970). It seems clear that the amendment's purpose was to make more of the community assets available for separate creditors. *See* Cross, The Community Property Law In Washington, 49 Wash.L.Rev. 729, 829-30 (1974). What is not clear is the impact of the characterization of the property. In other words, what effect is to be given to the phrase "[no] interest in the earnings of the other"? Defendants contend that the nature of the tax refund is governed by

RCW §§26.16.010-030 and that the refund is, therefore, community property. Plaintiff seems to argue that while the tax refund may be community property for most purposes, for purposes of collection of a separate debt, the property is not community property.

*Van Dyke* did not address the characterization issue. *Van Dyke* is a collection case. It held that the earnings of a noncustodial, nonobligated spouse are not subject to the antenuptial obligation of child support. That *Van Dyke* did not address the issue is not surprising. In terms of State law, there would be no difference between a limitation of property subject to creditors and a determination that an individual did not have a property interest in a particular asset. Either determination would prohibit the creditor subject to State law from reaching the asset. The distinction, however, becomes critical when Federal law comes into play.

The distinction was made in *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970). The issue in *Overman* was whether the United States could levy on community property to satisfy the separate tax obligation of one of the spouses. Defendants had argued that based on the pre-amended RCW §26.16.200, the community property was immune from the husband's premarital debt. The Ninth Circuit held, however, that in order for the Government to reach the community property it was only necessary that the obligated spouse have a property interest in the asset. The court went on to hold that even if RCW §26.16.200 created a limitation on the extent of ownership rights of the obligated spouse, it was of "no moment." If the taxpayer had a property interest in a particular asset, the Government could reach it. Furthermore, the Government could cause the involuntary conversion of the entire asset, although they were limited to retaining the half interest in the asset of the obligated spouse. This comports with the defendants' actions in the present case where half of the tax refund is retained.

The Court finds that the analysis of *Overman* controls the characterization issue. Admittedly, the language of the first proviso in

RCW §26.16.200 is troublesome. Also, *Overman* specifically did not address the statutory amendments. *See Overman*, 424 F.2d at 1145, n. 2. Still, it is undisputed that the tax refund is community property. The creditor limitation is not a matter of substantive property law but only serves to insulate property from the reach of creditors. Exempt status of property under State law need not bind the Federal collector. *See United States v. Mitchell*, 403 U.S. 190, 91 S.Ct. 1763, 29 L.Ed.2d 406 (1971); *Broday v. United States*, 455 F.2d 1097 (5th Cir.1972). The Court cannot accept plaintiff's assertion of "limited status" property: community property for all purposes except for payment of separate debts.

Even assuming that RCW §26.16.200 and *Van Dyke* need not bar defendants from retaining the tax refund, the question remains whether the Washington statute nonetheless precludes retention and transfer in light of Congressional intent. In other words, did Congress intend that property exemptions applicable to Washington State parties (such as Thompson in *Van Dyke*) be inapplicable to Federal parties?

26 U.S.C. §6402(c) provides that the amount of any overpayment to be refunded to the person making the overpayment is to be reduced by the amount of any past-due support owed by that person. Thus, two determinations must be made. First, is there a person who is owed on overpayment? Second, does that person owe past-due support? If so, then the Secretary of the Treasury is directed to reduce the amount of overpayment owed to that individual by the amount of the past-due support. In our case, it is conceded that plaintiff's husband owes past-due support. Moreover, just as plaintiff's husband would be liable for Federal income taxes generated by plaintiff's community earnings, so, too, would he be entitled to the overpayment created by those community earnings. *See Bagur v. Commissioner*, 603 F.2d 491 (5th Cir.1979); *Simmons v. Cullen*, 197 F.Supp. 179 (S.D.Cal.1961). *Cf. United States v. Merrill*, 211 F.2d 297 (9th Cir.1954). Plaintiff's husband would be owed the overpayment in the same manner as plaintiff. Therefore, retention of the

husband's property interest in the overpayment generated by plaintiff's earnings is authorized under the literal language of the statute. Moreover, given the strong Federal policy favoring the collection of past-due support and the intent of congress in the enactment of the "transfer" collection method to develop a collection method as an alternative to those already available to the States, the Court concludes that Congress did intend that Federal law prevail as to the method of reaching the plaintiff's husband's interest in the overpayment.

DUE PROCESS

Plaintiff's final objection concerns the due process clause of the Fifth Amendment. Plaintiff contends that she is entitled to notice and an opportunity to be heard in regard to the transfer of the overpayment. Plaintiff emphasizes that she is not a judgment debtor and has not participated in any hearing procedure to determine the existence or the amount of any child support obligation.

In order to evaluate plaintiff's due process challenge, the particular procedures employed by defendants must be examined. There are seven steps to this process. First, a determination must be made that an individual owes child support. *See* 42 U.S.C. §664(c). This determination is made by State court or administrative order and is presumably a process in which the obligated spouse has participated. Second, after the obligated spouse has failed to make the child support payments, the State agency notifies the Secretary of the Treasury that the individual has not paid and that a particular amount is past due. 42 U.S.C. §664(a). Third, the Secretary of the Treasury determines whether any overpayment is due the named individual. Fourth, if there is any overpayment due, the Secretary is authorized to retain an amount equal to the past-due support and to transfer that amount to the State agency. 42 U.S.C. §664(a). Fifth, the Secretary is to notify the person making the overpayment that "so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State." 26 U.S.C.

§6402(c). Sixth, if an additional claim is made to the Internal Revenue Service that the amount withheld is in error, the Service will calculate the obligated spouse's interest in the overpayment and will refund the rest. Seventh, if the parties object to the recalculation, they are informed that they may file suit in the appropriate Federal court.

Two notices have been sent to plaintiff. The first informed her that her overpayment had been paid to the State of Washington to fully or partially satisfy a prior support obligation. The notice directed questions about the obligation to the Department of Social and Health Services in Olympia, Washington. The notice did not indicate that only half of the overpayment created by community earnings would be retained. Instead, it stated that if no other Federal taxes were owed, a refund check for any remaining balance would be issued. The second notice was sent during the pendency of the present action. It stated that pursuant to Washington community property law, half of the claim for refund was allowed. If plaintiff contested the amount, she could bring suit in the appropriate Federal District Court or the Court of Claims.

There can be little doubt that plaintiff has a property interest in the overpayment. Defendants concede that they may retain only half of the overpayment generated by community earnings. Nonetheless, they retain the full overpayment until an additional claim for refund is made. Placing the onus on the taxpayer to file a claim for a refund is allegedly necessary because "it is impossible for the Internal Revenue Service to make a prior determination of the proper allocation." As the determination simply consists of calculating the community interest in the overpayment and dividing by two, the Court strongly questions the impossibility of a prior conclusion. Even assuming the impossibility of such a result, there is no reason for the notice sent to plaintiff and her class not informing the nonobligated spouses that only half of the community property overpayment would be retained.

Due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1949). One of the fundamental purposes of notice is to alert individuals that their interests are being affected and to permit adequate preparation to challenge those activities. *See Memphis v. Light, Gas and Water Division v. Craft*, 436, U.S. 1, 98 S.Ct. 1554, 57 L.Ed.2d 30 (1978); *Transco Security, Inc. of Ohio v. Freeman*, 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 101, 70 L.Ed.2d 90 (1982). *See also Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir.1981) (due process requires that tenants receive notice of their right to receive retroactive payments). Without informing plaintiff and her class that only half of the community overpayment need be retained unless an additional claim was asserted, defendants have made it at best onerous and at worst virtually impossible for individuals in plaintiff's position to obtain their uncontested share of the refund. If anything, the notice sent seems to imply that all of the overpayment would be retained regardless of its community or separate property nature. It is uncontested that the Department of Social and Health Services, the agency designated on the notice which would answer any questions, did not inform plaintiff, or anyone else submitting declarations in this lawsuit, that only half of the community overpayment need be retained. Considering that Washington is an "item" theory community property state and that each spouse has an undivided one-half interest in every community asset, *see In re Coffey's Estate*, 195 Wash. 379, 81 P.2d 283 (1938), and in light of recent Washington developments in regard to the availability of community assets for separate debts, *see deElche v. Jacobsen*, 95 Wash. 2d 237, 622 P.2d 835 (1980), even assuming the nonobligated spouse was aware of the impact of community property law on the overpayment, believing that defendants could retain the entire amount would not be an unreasonable conclusion.

The Court must find that the notice is insufficient to apprise the nonobligated spouse of their right to at least half of the community

overpayment. Under the standard adopted by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), no other result is possible. The private interest, that is, the interest of people in plaintiff's position receiving their uncontested share of the community overpayment, is significant. The risk of erroneous deprivation of such interest through the procedures used is substantial for individuals in plaintiff's class. The probable value of additional or substitute procedural safeguards is great considering that the defendants will not refund any of the overpayment absent an additional claim. Finally, the Government's interest in not providing the notice is small. The cost of adding one line to the present notice must be minimal. Even agreeing with defendants that calculation of the refundable interest of the nonobligated spouse absent an additional claim is impossible, a simple notice informing that spouse that an additional claim is necessary in order to obtain any overpayment is not only possible but obligatory. The Court assumes that after the additional claim for refund is made, defendants will promptly send the uncontested half of the community overpayment.

Plaintiff also seeks some form of hearing procedure where she may contest the retention of the overpayment. Presumably, a hearing would not be necessary regarding the undisputed half of the community overpayment for that half should be returned as soon as it has been calculated. Plaintiff's hearing request focuses on the contested half of the overpayment. At the hearing, plaintiff and people in plaintiff's position would raise both legal and factual defenses to the assessment.

To the extent a hearing is requested to assert the earned income credit and *Van Dyke* arguments discussed *supra*, no hearing would be required. Those being the only legal issues asserted by plaintiff, the Court concludes that a hearing to challenge the legality of the retention is not necessary. Plaintiff additionally asserts that a hearing is necessary to challenge the amount of retention. Specifically, she requests a proceeding where she could litigate the issue of ability to pay.

There is something uniquely inappropriate in involving the Federal Government in such a hearing. 42 U.S.C. §664 and 26 U.S.C. §6402 did, to a limited extent, put the Federal Government in the child support collection business. Those sections have not, however, resulted in an abandonment of the scheme whereby the States have the primary responsibility in the collection process. Under the "transfer" collection method, the defendants do no more than retain and transfer an amount certified by a State agency. They make no determinations of liability and ability to pay. It was the conduit nature of defendants' involvement which necessitated finding the "transfer" collection method was not subject to the procedural and jurisdictional limitations of a tax suit.

Plaintiff's argument does not have some equitable appeal. Plaintiff was not a party to the proceeding where the support obligation was set nor was that obligation one owed by her. There are, however, proceedings available for someone in plaintiff's position to challenge the amount of the determination. *See* RCW §26.09.170 (modification of decree of child support) and WAC §388-11-140 (modification of administrative determination of support). At either proceeding the arguments of inability to pay and other factual defenses can be raised. Considering the existence of these other proceedings and the lack of Federal participation in the determination of the amount of child support, no additional hearings are required.

For the above stated reasons, the Court finds and rules as follows:

1. Defendants' motion to dismiss is DENIED. The Court has subject matter jurisdiction and sovereign immunity is waived. The procedural limitations of a tax suit are deemed inapplicable to the present action.

2. Plaintiff's motion for class certification is GRANTED.

3. The cross-motions for summary judgment are GRANTED in part and DENIED in part. The Court finds that earned income

credits are within the scope of the statutes. The Court also concludes that the limitations of *Van Dyke* are inapplicable to the Federal collector. Due process, however, requires that the notice of the overpayment being retained inform in the individuals that only half of the community property overpayment will be retained if an additional claim for that half is made. Besides adequate notice, no additional proceedings are required by due process.

The Clerk of this Court is instructed to enter Judgment pursuant to this Order and to send uncertified copies of this Order and of the Judgment to all counsel of record.

## APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ELINOR NELSON, *Et Al.* | : | |
| *Plaintiffs* | : | |
| | : | |
| *v.* | : | Civil Action No. N82-173 |
| | : | |
| DONALD REGAN, *Et Al.* | : | |
| *Defendants* | : | |
| | : | |
| | : | AFFIDAVIT |
| | : | |
| STATE OF CONNECTICUT | : | |
| COUNTY OF HARTFORD | : | SS Hartford |
| | : | September 13, 1982 |

Anthony DiNallo, being duly sworn, hereby deposes and says:

1. I am over eighteen years of age.

2. I believe in the obligation of an oath.

3. This Affadavit is based on my personal knowledge as set forth.

4. I am the Chief of the Child Support Division of the Department of Human Resources. My responsibilities include administration of the Child Support program in the State of Connecticut mandated by Title IV-D of the Social Security Act.

5. On September 23, 1981 I compiled a list of 21,954 names of persons who were delinquent in child support payments assigned to the State. Such a list was to be submitted to IRS for the purpose of

offsetting such individuals' tax refunds for the taxable year 1981. The total amount of delinquencies represented by this list was $63,335,489.00.

I submitted an amended certified list containing 20,714 names of persons delinquent in child support payments for a total amount of $62,863,251 on September 30, 1981. After the amended certified list was submitted, I requested further deletions and on January 14, 1982, the Office of Child Support of the Department of Health and Human Services confirmed that a final list of 20,280 names of persons delinquent in child support had been submitted to IRS for a total amount of $62,401,120.00. Certain names on the original list had been removed from the amended list and further deletions were made from the amended list for various reasons, including cases in which persons on the original list had paid their support arrears.

Only persons whose amount of past support was not less than $150.00 and whose support had been delinquent for three months or longer, and whose support obligation had been assigned to the State according to the records of the Child Support Division, were certified as provided by federal rules and regulations, (45 CFR 303.72 (b) (1) (2) (3), as amended February 19, 1982). In addition, the Child Support Division only certified persons on the original list who were more than three months delinquent under a current pay plan. Of the 20,280 names that were confirmed as certified by the Office of Child Support, it was determined by the Connecticut Child Support Enforcement Division that 60 names were certified in error. Of the 60 persons, 56 have received payments from the State for the IRS refund checks that were withheld and distributed to the State. Of the remaining 4 cases the State has not received the offset monies from IRS in 3 cases and in 1 case the refund is being processed. Included in this refund group was the plaintiff Elinor Nelson who had no liability for support because the previously entered support order against her had been vacated by the Court. Mrs. Nelson received a check in the amount of $2,951.31 dated June 4, 1982 from the State of Connecticut representing the 1981 income tax refund due her according to her tax return.

6. In regard to the plaintiffs Dennis Eaton and Edward Madzik who testified at the hearing on April 21, 1982, the following information was repeated to a member of my staff in the ordinary course of business by family relations officers of the Superior Court and is reflected in their current accounts:

(a) Dennis Eaton received a retroactive suspension of his court order based upon his disability, to October 20, 1981. However, even with this retroactive suspension of his child support order, Mr. Eaton had a remaining arrearage of $1,178.74. Therefore, his tax refund was applied toward such arrearage.

(b) Edward Madzik claimed his child support obligation had been discharged in bankruptcy. However, since his discharge in bankruptcy, he accumulated an arrearage of $1,080.06 through March 15, 1981, when AFDC assistance was discontinued for his dependent children. According to Eileen Gallager of the New Haven Family Relations Office, Superior Court, on June 25, 1982, he agreed to a $10.00 a week voluntary wage execution to be applied toward his arrears, paid $200.00, and, when told his IRS refund of $410.80 would still be applied to his arrearage, he was agreeable.

7. The plaintiff Phillip Corso had three separate support obligations to the State of Connecticut. His petition in bankruptcy was filed March 31, 1980. As of March 31, 1982, he had an arrearage of $2,297.00 in two of these accounts. A statement of his accounts is attached. Mr. Corso's income tax refund was applied toward his arrearage.

8. Of the final list of 20,280 names confirmed by the Office of Child Support as certified to the IRS, 60 persons were determined to have been certified in error, including Mrs. Nelson. Other cases involved erroneous certification of persons whose names and social security number were confused with other persons, often members of the same family, who had child support arrearage.

9. From 1981 tax refunds due persons who were delinquent in child support, the State of Connecticut to date has received $6,157,060.40 as a result of the tax refund intercept program. $508,842.85 has been refunded to 1,515 individuals including 56 persons who were improperly certified. The majority of such cases represent persons who made payments toward their child support arrearage after the final list of 20,280 names was submitted.

10. According to information received by me from the Bureau of Collection Services, Department of Administrative Services, State of Connecticut, information which is generally available to the public, the Bureau has reported accounts receivable, representing delinquent court ordered child support payments assigned to the State in the amount of $92,024,248 as of June 30, 1982, $82,229,455 as of June 30, 1981, $67,735,962 as of June 30, 1980 and $54,117,268 as of June 30, 1979.

Dated at Hartford, Connecticut this 13th day of September, 1982

ANTHONY DINALLO, Chief, Child
Support Unit, Department of
Human Resources
110 Bartholomew Avenue,
Hartford, CT

Subscribed and sworn to before me this 13th day of September, 1982 as true and correct to the best of affiant's best information and belief.

JOAN LANGLAIS,
Notary Public
My Commission Expires 3/31/87

No. 84-33

Office-Supreme Court, U.S.
FILED
AUG 10 1984
ALEXANDER L. STEVAS,

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1983

**RONALD MANNING, Commissioner of the Department of Human Resources of the State of Connecticut,**
*Petitioner*

v.

**ELINOR NELSON, DONALD SPELLS, DENNIS EATON, PHILLIP CORSO, individually and on behalf of those similarly situated,**
*Respondents*

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## Table of Contents

Table of Authorities.....ii

Questions Presented.....iii

Reasons for Denying the Writ.....1

I. There are no special circumstances requiring the Court's review of this action.....1

II. The Court of Appeals properly concluded that earned income credits are not includable in the amount of refund against which delinquent support payments could be offset under the income tax intercept program.....2

III. The Eleventh Amendment is not a barrier to an order directing the Internal Revenue Service to return earned income credits improperly withheld.....8

IV. Conclusion.....10

## Table of Authorities

### Cases

Bank of United States v. Planters Bank of Georgia, 22 U.S. 904 (1824).....9

President, Directors and Co. of Bank v. Wister, 27 U.S. 318 (1829).....9

Quern v. Jordan, 440 U.S. 332 (1979).....9

Searles, In re, 445 F. Supp. 749, 752 (D. Conn. 1978).....5

Young. Ex parte, 209 U.S. 123 (1908).....8

### Constitutional Provision

United States Constitution, Amendment XI.....8

### Statutes

Omnibus Budget Reconcilliation Act of 1981, Pub. L. No. 97-35, sec. 2331, 95 Stat. 357 (1981).....2,4

26 U.S.C. §43.....5
26 U.S.C. §43(C)(1)(B).....7
26 U.S.C. §6401.....6
26 U.S.C. §6402(c).....3,4
42 U.S.C. §664(a).....2,4,6

### Miscellaneous

5 Rep. No. 94-36, 94th Cong., 1st Sess. 11, reprinted in 1975 U.S. Code Cong. and Ad. News 54, 84.....6

Questions Presented

1. Whether the Court of Appeals properly concluded that earned income credits are not includable in the amount of refunds against which delinquent support payments could be offset under the income tax intercept program.

2. Whether the Court of Appeals properly determined that the Eleventh Amendment is not a barrier to an order directing the Internal Revenue Service to return earned income credits improperly withheld from taxpayers.

## Reasons For Denying The Writ

### I. There Are No Special Circumstances Requiring The Court's Review of This Action

The present case does not involve a matter in which the courts of appeals are in conflict. Nor does this case require Supreme Court review or involve a court of appeals decision which is contrary to this Court's prior rulings. Instead, the Court of Appeals for the Second Circuit has decided a matter of federal statutory construction consistent with the underlying legislative purposes and language as in more fully explained below. Furthermore, neither the Secretary of Treasury nor the Secretary of Health and Human Services has chosen to petition this Court for review. As such, petitioner has failed to demonstrate any

special circumstances requiring this Court's review of the case.

II. The Court of Appeals properly concluded that earned income credits are not includable in the amount of refunds against which delinquent support payments could be offset under the income tax intercept program

The income tax refund intercept procedure at issue in this case was established by §2331 of the Omnibus Budget Reconcilliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981)(hereinafter "OBRA"), which amended both the Social Security Act and the Internal Revenue Code. In determining whether the earned income credit is subject to the intercept procedures, initial inquiry must be directed to the text of OBRA itself. The relevant provisions added by "OBRA" are §464(a) of the Social Security Act, 42 U.S.C. §664(a), which provides:

> Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to §402(a)(26), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable he shall withhold from such refunds an amount equal to the past due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with §457(b)(3).

(Emphasis added). Furthermore, 26 U.S.C. 6402(c), of the Internal Revenue Code was added to provide:

> The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in §464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with §464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was

> necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

(Emphasis added).

As the underlined portions make clear, the offset in 26 U.S.C. §6402(c) only applies to those funds discussed in 42 U.S.C. §664(a) which concern "refunds of federal taxes paid." Given the underlying statutory scheme, it is apparent that earned income credits are not subject to the intercept procedures.

Although distributed through the tax refund process, earned income credit benefits are not refunds of Federal taxes paid. One need not have paid any tax, or have owed any tax, to be eligible for the benefit. For example, at the time OBRA was adopted in 1981, a couple with a child and with income totaling $3,000

would have had no tax liability. Still, even if no taxes had been withheld, the couple would have been eligible for an earned income credit of $298. In fact, "[m]ost of the people who receive [earned income credit benefits] have little or no tax liability; part or all of what they receive exceeds the amounts withheld from their earnings." In re Searles, 445 F.Supp. 749, 752 (D. Conn. 1978).

"[T]he earned income credit is in substance an item of social welfare legislation, intended to provide low-income families with 'the very means by which to live' . . . . "Ibid, at 753. It is available under 26 U.S.C. §43 to certain families with children and with earned income of less than $10,000 a year. What distinguishes the adults in families eligible for earned income credit benefits is that they are working

rather than receiving welfare. See S. Rep. No. 94-36, 94th Cong., 1st Sess. 11, reprinted in 1975 U.S. Code Cong. & Ad. News 54, 84.

Contrary to the petitioner's claim, the Second Circuit Court of Appeals' decision does not ignore the language of Congress or Congressional intent in enacting the intercept procedures. It was Congress which limited the Secretary of the Treasury to determining whether such amounts, "as refunds of Federal taxes paid" are payable to a state claiming a child support arrearage. 42 U.S.C. § 664(a).

Certainly the Court of Appeals' conclusion that the controlling reference should be the text of the relevant provision of OBRA rather than the general language of 26 U.S.C. §6401 is not clearly erroneous. Rather than being

clearly erroneous, the decision recognizes the various competing interests at work in the intercept procedures and in the earned income credit provision. The latter benefit is geared exclusively to lower income working families supporting children in their homes. 26 U.S.C. § 43(c)(1)(B). By contrast, the intercept program applies to reimbursement to the states for past welfare benefits. The Court of Appeals did not elevate one purpose over another. Rather it recognized that in the specific statutory scheme which was limited to refunds of "federal taxes paid," Congress had made this difficult choice which must be respected.

## III. The Eleventh Amendment Is Not A Barrier to An Order Directing the Internal Revenue Service to Return Earned Income Credits Improperly Withheld

In response to petitioner's claims that the trial court's order violates the Eleventh Amendment, the simple answer is that the district court order was directed solely to the Internal Revenue Service and therefore the Eleventh Amend ment is inapplicable.[1] Petitioner's claim that the Internal Revenue Service might seek reimbursement from Connecticut is irrelevant to the case.

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[1] The petitioner must concede that the Eleventh Amendment is no barrier to injunctive relief against state officials requiring future conduct to comply with federal statutory and constitutional provisions. See Ex Parte Young, 209 U.S. 123 (1908). To the extent that petitioner questions the disposition of earned income credits, his challenge is limited to the year of 1981, since this was the only retroactive period in question.

In Bank of United States v. Planters Bank of Georgia, 22 U.S. 904 (1824) and President, Directors and Co. of Bank v. Wister, 27 U.S. 318 (1829), the Court recognized that even though an action may have an incidental effect on a state's interest, that does not transform it into an action against the state for purposes of the Eleventh Amendment. See also Quern v. Jordan, 440 U.S. 332, 348 (1979), a welfare benefit case where the Court rejected an Eleventh Amendment challenge to an order requiring a state agency to give notice of available administrative remedies, noting that "whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts and legislature, not with the federal court." Similarly, in the present case, whether the State is

eventually called upon to make reimbursement to the Internal Revenue Service is entirely a matter of its own separate contractual and statutory obligations. It is not the federal court which is called upon to make such an order.

IV. CONCLUSION

This case does not require this Court's review. Indeed the decision of the Court of Appeals is correct and proper and therefore the petition for writ of certiorori should be denied.

Respectfully submitted

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No. 84-33

# In the Supreme Court of the United States

OCTOBER TERM, 1984

RONALD MANNING, COMMISSIONER OF THE DEPARTMENT OF HUMAN RESOURCES OF CONNECTICUT, PETITIONER

*v.*

ELINOR NELSON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS

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## TABLE OF AUTHORITIES


Page

Cases:

*Coughlin* v. *Regan*, 584 F. Supp. 697 ..... 3, 5, 6

*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564 ..... 6

*Rucker* v. *Secretary of the Treasury*, 555 F. Supp. 1051, appeal pending, No. 83-1804 (10th Cir.) ..... 3, 5-6

*Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. 729, appeal pending, No. 83-3694 (9th Cir.) ..... 3, 5, 6

Constitution, statutes and rule:

U.S. Const. Amend. XI ..... 3

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 *et seq.* ..... 6

Internal Revenue Code of 1954 (26 U.S.C.):

§ 43 ..... 4
§ 43(a) ..... 3
§ 43(b) ..... 3
§ 43(c) ..... 3, 4
§ 6305 ..... 6
§ 6305(a) ..... 6
§ 6401(b) ..... 4, 5
§ 6402(a) ..... 4, 5
§ 6402(c) ..... 1, 2, 3, 4, 5, 6, 7

Page

Constitution, statutes and rule—Continued:

Omnibus Budget Reconciliation Act of 1981, § 2331, Pub. L. No. 97-35, 95 Stat. 860 ..... 1

Social Security Act, Tit. IV, 42 U.S.C. (Supp. V) 661 *et seq.* :

42 U.S.C. (Supp. V) 664 ..... 1

42 U.S.C. (Supp. V) 664(a) ..... 2, 4

Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 *et seq.* ..... 6

§ 101(b)(1), 88 Stat. 2358 ..... 6

Sup. Ct. R. 19.6 ..... 2

Miscellaneous:

S. Rep. 93-1356, 93d Cong., 2d Sess. (1974) ..... 6

S. Rep. 94-36, 94th Cong., 1st Sess. (1975) ..... 3

S. Rep. 97-139, 97th Cong., 1st Sess. (1981) ..... 6

# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. This suit involves the so-called "tax refund intercept" program. Under this program, federal tax refunds due to persons who have failed to make child support payments, the rights to which have been assigned to a state that has provided aid to those persons to whom the support is due, are "intercepted" by the IRS on the state's behalf and remitted to the state.[1] In this manner, the state is reimbursed, at least in part, for the cost of providing support that the delinquent parent failed to provide.

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[1]The principal provisions comprising the interception program are Section 464 of the Social Security Act, 42 U.S.C. (Supp. V) 664, and Section 6402(c) of the Internal Revenue Code of 1954 (26 U.S.C.). Both of these provisions were enacted as part of Section 2331 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 860.

Respondents brought this action in the United States District Court for the District of Connecticut against the Secretary of the Treasury, the Secretary of Health and Human Services, and the Connecticut Commissioner of Human Resources. Respondents alleged that tax refunds due them were wrongfully withheld by the IRS so that the refunds could be reduced by the amount of child support owed to the State of Connecticut. Respondents complained that Section 464(a) of the Social Security Act, 42 U.S.C. (Supp. V) 664(a), and Section 6402(c) of the Internal Revenue Code of 1954 (26 U.S.C.), as implemented by the defendants, deprived them of their property without due process of law in that they were not given adequate notice and an opportunity for a pre-interception hearing.[2] Respondents further alleged that to the extent the refunds due them were attributable to the earned income credit (EIC) provided by Section 43 of the Internal Revenue Code, the refunds were outside the scope of the intercept program.

After rejecting various jurisdictional defenses advanced by petitioner and the federal defendants, the district court held that an amount due an individual as a result of an EIC is not an "overpayment" for purposes of Section 6402(c) of the 1954 Code. Accordingly, the court concluded that such amount may not be intercepted by the IRS. Pet. App. 45a-48a. The court of appeals, although acknowledging that the question is a close one, affirmed the district court (*id.* at 12a-16a).

2. The Secretary of the Treasury and the Secretary of Health and Human Services are respondents in this Court pursuant to Rule 19.6 of the Rules of this Court. The

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[2]The district court held that the notice given by the state was inadequate and that the state, before certifying to the IRS the delinquency of any person, must provide that person with an opportunity for a hearing (Pet. App. 27a-30a, 39a-44a). Petitioner did not challenge this aspect of the district court's decision in the court of appeals.

government did not seek this Court's review of the decision below because it is one of first impression in the courts of appeals. Nevertheless, we believe that the court of appeals' decision on the EIC issue is erroneous. As discussed below, three district courts have reached decisions contrary to that of the Second Circuit in this case,[3] and the lack of uniformity on the issue poses substantial administrative problems for the IRS in intercepting refunds pursuant to the mandate of Section 6402(c) of the 1954 Code. While the Court may deem it more appropriate to await the decisions of other circuits (see note 3, *supra*) before reviewing the EIC issue, we believe that this Court's resolution of the issue ultimately will be required.[4]

a. Section 43(a) of the Internal Revenue Code provides (in the case of eligible individuals as defined in subparagraph (c)) for a credit against tax based on a percentage of the taxpayer's earned income. The maximum credit allowable is $500. The credit is reduced proportionately to the extent the taxpayer's adjusted gross income exceeds $6,000 but is less than $10,000. No credit is allowable for individuals whose adjusted gross income exceeds $10,000 (26 U.S.C. 43(b)). The credit was intended to benefit low-income families who pay little or no income tax and to serve as an incentive for low-income people to work, thereby reducing their need for federal assistance. See S. Rep. 94-36, 94th Cong., 1st Sess. 11 (1975).

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[3]*Coughlin* v. *Regan*, 584 F. Supp. 697 (D. Me. 1984); *Rucker* v. *Secretary of the Treasury*, 555 F. Supp. 1051 (D. Colo. 1983), appeal pending, No. 83-1804 (10th Cir.); *Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. 729 (W.D. Wash. 1982), appeal pending, No. 83-3694 (9th Cir.).

[4]We express no opinion on the second question presented in the petition, relating to the state's immunity from suit under the Eleventh Amendment.

Although Section 43 provides only for a credit to be applied against income tax liability, Section 6401(b) of the Code provides that if the amount of certain types of credits, including the EIC, due a taxpayer exceeds his tax liability, the amount of such excess is treated as an "overpayment." Under Section 6402(a), the IRS may credit any overpayment made by a taxpayer against any outstanding tax liability that he may have, but must, except as provided otherwise in subsection (c), refund any balance to such taxpayer. The effect of these provisions is to require the IRS to treat an EIC, to the extent it exceeds the taxpayer's outstanding tax liability, as a refundable overpayment of tax. Thus, an individual eligible for an EIC who has no tax liability for a particular year and who, consequently, has made no payment of tax, is nevertheless entitled to a cash refund of the amount of the credit to which he is entitled under Section 43.

Subsection (c) of Section 6402 provides, however, that the "amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act." The statute further directs the Secretary to remit the amount by which the overpayment is so reduced to the state to which the rights to the past-due support have been assigned.

In the case at bar, a portion of the refunds due respondents but intercepted by the IRS pursuant to Section 6402(c) is attributable to EICs authorized by Section 43. Respondents maintain, as the courts below held, that an amount due an individual as a result of an EIC is not an "overpayment" for purposes of Section 6402(c) and therefore may not be intercepted by the IRS. Relying on the references in Section 464(a) of the Social Security Act to "refunds of Federal

taxes paid," respondents contend that the term overpayment as used in Section 6402(c) refers only to an actual overpayment of tax and does not include an amount, such as the EIC, which merely is deemed to be an overpayment of tax under Section 6401(b).

In our view, there is no valid basis for the distinction respondents seek to draw between actual overpayments of tax and amounts treated as overpayments under Section 6401(b). Nothing in the legislative history of the tax refund intercept program indicates that Congress intended to recognize such a distinction. On the other hand, adoption of respondents' position, as the court below recognized (Pet. App. 14a-15a), requires that the term overpayment be given one meaning for purposes of Section 6402(a) and a different meaning for purposes of Section 6402(c). The amount of an EIC due an individual is refundable to him under Section 6402(a) only because such amount, pursuant to Section 6401(b), is deemed to be an overpayment. The amount of any overpayment to be refunded under Section 6402(a) is, however, by express cross-reference, subject to the provisions of subsection (c) which direct the IRS to reduce the amount of any overpayment to be refunded by the amount of any past-due child support.

Given this express interrelationship between subsections (a) and (c) of Section 6402, and the absence of any affirmative support in the legislative history for respondents' anomalous position, there is no sufficient basis for concluding that Congress intended the term overpayment to have one meaning as used in the former subsection and another meaning for purposes of the latter. See *Coughlin* v. *Regan*, 584 F. Supp. 697, 706-707 (D. Me. 1984); *Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. 729, 733-734 (W.D. Wash. 1982), appeal pending, No. 83-3694 (9th Cir.); *Rucker* v. *Secretary of the Treasury*, 555 F. Supp. 1051,

1053 (D. Colo. 1983), appeal pending, No. 83-1804 (10th Cir.); see also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

Nor, contrary to the opinion of the court below (Pet. App. 15a), does the important social policy underlying the EIC tip the scales in favor of respondents' strained construction of the statute. The tax refund intercept program involves a social policy of at least equal importance — Congress's determination to respond to the increasing failure of individuals to honor their support obligations with respect to their dependent children. See S. Rep. 93-1356, 93d Cong., 2d Sess. 44-46 (1974); S. Rep. 97-139, 97th Cong., 1st Sess. 441 (1981); Pub. L. No. 98-378, 98 Stat. 1305 *et seq.*; *Coughlin* v. *Regan*, 584 F. Supp. at 707; *Sorenson* v. *Secretary of the Treasury*, 557 F. Supp. at 734; *Rucker* v. *Secretary of the Treasury*, 555 F. Supp. at 1053.[5] It therefore should not be presumed that Congress's overriding intent was to exclude refunds attributable to EICs from the intercept program. Accordingly, the inclusive language of Section 6402(c) should be regarded as determinative of Congress's intent. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. at 570.

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[5]S. Rep. 93-1356, *supra*, relates to the Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 *et seq.* Section 101(b)(1) of the Act (88 Stat. 2358) added Section 6305 to the Internal Revenue Code of 1954. Section 6305(a) authorizes the IRS to collect delinquent child support payments in the same manner as if the support liability were a tax. The enactment of Section 6402(c) of the Code in 1981 was intended to amplify and enhance the collection procedures previously authorized under Section 6305. See S. Rep. 97-139, *supra*, at 441.

Pub. L. No. 98-378, commonly known as the Child Support Enforcement Amendments of 1984, represents Congress's latest efforts to combat the problem of nonpayment of child support obligations. This statute expands the intercept program to include all taxpayers delinquent in their child support obligations, irrespective of whether their former spouses are receiving welfare, and also provides (beginning in 1986) for the mandatory withholding from wages of past-due child support obligations.

b. The ongoing controversy regarding the question whether an amount due an individual as a result of an EIC constitutes an overpayment for purposes of Section 6402(c) poses substantial problems for the IRS in administering the intercept program. In order for the IRS to administer the program in a cost-effective manner, the interception of refunds must be automated.[6] The IRS, however, cannot maintain a fully automated system in the absence of a uniform rule as to the treatment of EIC refunds. The decision below requires the IRS to exclude that portion of any refund attributable to an EIC in carrying out the mandate of Section 6402(c). If the IRS were to program its computers so as to implement that decision on a nationwide basis, states outside the Second Circuit might well bring suit challenging the exclusion of EIC refunds from the intercept program.[7] The IRS, accordingly, has a strong interest in a uniform resolution of the EIC issue presented by petitioner.

**CONCLUSION**

The decision below is erroneous to the extent it holds that EIC refunds are outside the scope of the intercept program, and the decision will significantly burden the IRS's administration of the program. Because the decision is the first by a court of appeals, the Court nevertheless may deem it appropriate to await the decisions of other circuits (see note

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[6]The number of interceptions effected by the IRS is substantial and is increasing each year. We are informed by the IRS that the total annual number of interceptions (rounded to the nearest thousand) for 1982, 1983, and 1984 (through June 25, 1984) were 273,000, 340,000, and 392,000, respectively. We have been further informed that approximately 20% of these intercepted refunds involve an EIC component.

[7]The IRS estimates that, as a result of the decision below, the State of Connecticut may be required to return approximately $1,375,000 of the amount it received under the intercept program during the first three years of the program.

3, *supra*) before considering the issue. Should the Court grant the instant petition, however, the United States would participate in support of petitioner.

Respectfully submitted.

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*Solicitor General*

AUGUST 1984